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PLANNING AND PREPARING FOR NEGOTIATION

How to Set Your Targets Prior to Negotiations

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James D. Vilvang, Q.C.
Vancouver, BC

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A. Preparing your Case… and Yourself.

1. A few years ago, I presented a paper entitled **Pro Pace Para Bellum** (If You Want Peace, Prepare for War). I still think that's the way to prepare for any negotiation or mediation. If you want to be able to negotiate effectively, the other side must believe that if you do not achieve your goal you are prepared to walk away and go to trial. Not only must they believe that you are willing to go to trial, they must believe that you are thoroughly prepared to go to trial and that if you do, you will be effective.
2. I am not going to spend a lot of time restating the obvious aspects of preparation, such as know the facts, know the law, etc. I do however want to stress that you should be conscious of a key difference between preparing for trial and preparing for mediation. When you start a trial, you are educating the judge and jury who have just become involved with no prior information. When you start a mediation you will be speaking to people who have almost as much knowledge of the facts and law as you have. Don't bore them by telling them things they already know, i.e. "The accident happened on March 4th 2003…". Be prepared to immediately get right into the matters that are really in issue. Be prepared to present new information, either new facts or new interpretations, and be prepared to deal with the other side's points right at the beginning.
3. Decide before you begin exactly how much you are willing to disclose at mediation and what you are planning to save for trial. You may decide to change your mind part way through, particularly if you learn that the other side is under some misapprehension, or if you think that you are on the verge of a deal, but it is best to have a clear game plan ahead of time.
4. Try to find out as much as you can about the mediator and the opposing counsel and party. The

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FAX 604 688 3830
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more you know about the people you are dealing with the better you will be able to pick up on non-verbal clues. You will also have a better idea of who you are really dealing with. Should you be trying to persuade counsel or the party directly? Can you recruit the mediator to be your ally? Can you trust the mediator with confidential information? How much authority do they have? Does No really mean No? Proper preparation will greatly enhance your ability to deal with these critical issues during the mediation.

5. Many counsel come to mediation without any case law and proceed to make statements like, "the cases all support an award of $100,000 for this type of injury." If they are asked for those cases, they reply "I don't bring case law to mediations." In my opinion that approach is very weak. If there are cases that support your position, bring them to the mediation, but better yet, present them well in advance of the negotiation/mediation. No one wants to spend time during a mediation session reading cases. Also, by presenting cases in advance, you give the other side an opportunity to determine that the cases you have presented aren't anomalies.
6. If you are planning to get more expert reports or interview witnesses before trial, do it before the mediation. Statements like, "I'm going to get a report from Dr. Smith who will say that my client is permanently disabled, so I'm not worried about the reports which you have that say that he is fine", carry no weight. If Dr. Smith is going to say that your client is totally disabled, wait until after you have that report to negotiate.
7. The same thing goes for lay witness evidence. Try to get signed statements from the lay witnesses you will be relying on before the mediation. I don't recommend producing them to the other side at the mediation, but it is often effective to quote from them, with or without giving the witness's name.

B. Preparing your Client.

8. Proper preparation of the client is absolutely critical. This is a process which begins from the time of your first meeting with the client.
9. Be realistic. Be careful not to give your client an overly optimistic view of his/her chances of success.
10. Never discuss figures or chances of success with your client "off the top of your head." This is a sure fire way to create problems later on. No matter what happens later, the first figures you mention to your client will be forever etched in their memory. If you fail to achieve those numbers, your client will probably feel that you have not done a good job.
11. Make sure that your client understands the weaknesses of their case. Prepare them for what they are going to hear from the other side during the negotiation. Advise them as to how you intend to deal with the arguments the other side will be putting forward.
12. Tell your client that they have to be prepared to walk away. By the time most cases reach

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negotiation/mediation, most people are so worn down by the litigation process and their hopes for it to end are so high that they will be tempted to accept an offer which is inadequate. Advise your client that a round of negotiation, or even a mediation, is just another phase of the overall litigation strategy and that they have to be prepared to go all the way to trial and possibly an appeal.

13. On the other hand, make sure that your client doesn't want to walk away too early. Tell them in advance to expect a "low ball" first offer. I have seen clients so shocked, offended, and disheartened by a first offer that they immediately lose faith in the process and the other party's willingness to negotiate in good faith. Assure clients beforehand that "it's not where you start, it's where you wind up."
14. Discuss your opening position with your client. Make sure that they understand and approve of the information and arguments you will be providing and most importantly, make sure that they understand that an opening position is only a starting point for negotiation. Tell your client that BEFORE you let them see the numbers.
15. At the same time that you discuss the opening position with your client, advise your client what you realistically expect to be able to achieve. It is essential that you have carefully thought this through. I usually say to my clients:

(a) This is where I want to start, and why.

(b) This is what they will probably offer, and why.

(c) This is how I will attempt to counter their arguments.

(d) If at the end of the day, unless we receive some significantly damaging new information:

(i) If there is less than *x* on the table, we should walk away.

(ii) If there is between *x* and *y* on the table, you will have to consider it.

(iii) If there is more than *y* on the table you will be foolish not to take it.

16. Explain in as much detail as possible the dynamic of mediation so that your client will be as comfortable as possible with the entire situation. Make sure the client understands and approves of your battle plan and make sure that the client understands that often plans have to be changed as matters unfold.
17. Explain to your client what will happen if the matter does not settle at the mediation. Make sure the client understands the effect of a Formal Offer to Settle. Confirm that they are aware of anticipated court procedures such as Discoveries, Independent Medical Examinations, the Trial process, and the

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Appeal process. Discuss the uncertainties that go along with trial and especially the risks of a Jury Trial.

18. In face to face negotiations, the defence will use the opportunity to determine whether your client will be a good witness on their own behalf. The client's demeanour and credibility will be carefully scrutinized. Make sure that your client understands this. Excellent counsel work and solid supporting evidence from experts and other witnesses can easily be undermined if the client does not create a good impression.

C. Preparing the Other Side.

19. This process should also start long before any offer to settle or any invitation to mediate or negotiate is made. As your case develops, make sure that the other side has sufficient information to gain a general understanding of what the claim might be worth. Generally speaking you don't want to reveal all your evidence too early because you will want to have some ammunition to use at the negotiation/mediation. However, if the other side is completely in the dark and they are expecting a $30,000 claim and you come in at $3,000,000, it will be extremely unlikely that they will have authority to deal with the matter. For meaningful negotiations to take place, it is important that the other side has time to properly prepare its case as well. No one wants to negotiate from a position of ignorance.
20. Present a good thorough summary well in advance of the mediation. Your summary gives the other side much more information than what is contained in the words on the page:

(a) It shows the other side that you have worked hard on this case and that you are thoroughly prepared.

(b) It shows that you are knowledgeable and skilful and that you will be a good advocate if the matter proceeds to trial.

D. The Importance of Setting Targets.

21. As I stated above, I advise my clients before mediation where we are expecting to wind up. This serves two main purposes.

(a) It demonstrates to your client that there is some objectivity to the process. It lets the client know that you are not in a "settle at any price" frame of mind and that you are willing to continue to fight for them if the other side is not willing to be fair.

(b) If you are able to get the other side to or above the number you proposed to your client, your client will have the feeling that you have achieved a degree of success.

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22. Another benefit is that it helps you calibrate your moves. If you have a clear idea of where you want to end up, you will know exactly how much room you have. One never knows the number of moves that may be possible so you can't really control that variable, but you can control the amount of each of your moves, being careful to adjust along the way to insure that you are provoking the best possible response from the other side each time.
23. Don't make your targets too precise. Always leave a little wiggle room. You never know what seemingly insignificant concession at the very end might make the deal.

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