

Communication Guidelines Settlement Conference/Common Interest In Resolution

By Sarah Read

As with any settlement conference, it is important to have a basic understanding of the positions of both parties, and the relative strengths and weaknesses of those positions; before beginning settlement discussions. Where the parties have an ongoing business relationship and a common interest in maintaining that relationship, however, there often are options for resolving differences that do not simply reflect who was right or wrong in the legal sense. These options instead build on the desire of both parties to improve their ongoing business relationship. The following guidelines can help ensure that such mutually beneficial settlement options are identified and, where possible, implemented.

1. Listen To And Demonstrate Understanding Of The Other Party's Views and Proposals.

It is important to listen carefully when the other side is talking. Too often parties are formulating their own responses as the other side is talking and miss cues that can lead to a productive settlement. It is equally important to summarize what you have heard before responding to statements made by another party. This will demonstrate that you have understood them, and encourage them to listen to you.

When listening, try to understand not only the proposals being made, but also the underlying intentions and motivations. What is the real source of their concerns -- a specific claim, the structure of the overall relationship, personal differences, etc. ? What is the focus of their presentation -- past claims, or future opportunities? Are there certain parts of their presentation that reflect emotions like anger or enthusiasm? Do their comments confirm or contradict some of your own prior thoughts and assumptions about their intentions and motivations? Listening like this will also help you later formulate your own comments in a way that they will understand or accept.

Don't be afraid to be a responsive listener, one that draws the speaker out with comments and questions. Comments like, "I understand that was difficult for your company" and questions like "how did that affect you?", "why is that important to you?", or "how would that benefit you?" help draw out details that can form a foundation for the subsequent settlement.

Because it is difficult for others to listen to and understand your point of view until they are sure you have listened to and understood theirs, you should summarize what you have heard and ask for clarification before offering a response. This also ultimately saves time since the other parties will often reply to a response that indicates less than full agreement by re-explaining all of the points they think you must not have understood. If you demonstrate understanding of their proposal or perspective first, they are more likely to respond directly to alternative views or proposals that you offer.

2. Move Beyond The Past and Emphasize Common Interests.

Although past claims may have brought you to the settlement table, discussions that focus on who was right and who was wrong are less likely to result in settlement than discussions that focus on how the parties could best work together in the future. Of course it will still be necessary to discuss the past claims since you want to settle these. When discussing these claims, you can state your views yet avoid getting bogged down in argument, by introducing your comments with words like "we have a very different perspective on that [followed by a brief explanation]", and closing with words like, "Although our views are different, we can both benefit by resolving these issues and avoiding these types of disputes in the future; let's talk about what would help us move forward." It may be necessary from time to time to repeat variations of this, focusing on specific concerns that have been mentioned during the course of the discussions: "I understand that was difficult for you. As I mentioned, we don't agree on all the details, but we do agree that we want to avoid this type of issue in the future. I understand that you need. . . "

3. Remain Flexible and "Work Together" To Identify and Evaluate Options.

Proposals have to be made and responded to if a settlement is to be reached, but how you respond to or present a proposal determines how well you will work together to find one that is mutually beneficial. If you reject entirely a proposal offered by the other side or present a "take it or leave it" proposal of your own, you may eliminate many settlement options before they are even identified and considered. Generally, it is easier for parties to agree to something they help design. Thus it is helpful to work with the other side to develop the options to be considered. In introducing a proposal, it is helpful to identify the mutual concerns that it is intended to address, and to present it as one of several possible options: "We have a common interest in making sure the product is cost-effective and performs as expected. One thing we might consider is. . ."

If the other side makes a proposal that is unacceptable, you can encourage them to look at it from your point of view, using questions like, "How do you think this would benefit us?" "In what way do you believe this would help our future communications?" you can invite them to identify different options, without committing to anyone in advance or arguing each in sequence: "Let's see what alternatives we might have, and how they might work for our companies." You can also invite them to consider an alternative without committing yourself to it in advance: "What if we were to drop/modify [identify step or option and propose any alternative]? How would that affect you?"

If you put a new proposal on the table, you should consider first offering a broad outline of the proposal and inviting the other side to add details that would make it work for them: "We think it might be possible to [state outline of proposal]. Do you think that might work? How might we better define that?" You can also help the other party reconsider something previously rejected as alternatives are developed: "We may be able to do that, but if we did we would need something along the lines of [previously rejected option in order to (state concern that rejected option was meant to address)]. How do we make that work?"

It is also important to watch for and address any misunderstandings that may develop. If the discussions seem to be moving in the wrong direction, you can ask for clarification (whether of the issue, their position or of any proposal being made) or summarize what you are hearing them say. If you have summarized their comments from time to time, you can also ask them to summarize

yours when you see a misunderstanding developing: "I'm not sure we're communicating as well as I'd like to. What is your understanding of what I've proposed?" This gives you an opportunity to clarify in turn.

If discussions were productive but begin to move in the wrong direction, you might also consider changing the focus to planning the next meeting, as discussed below.

4. Plan for Another Meeting.

Even if you are able to agree to the basic points of a potential settlement, it is important to plan for an exchange of a draft settlement agreement, and a future meeting to finalize the settlement.

This ensures that any settlement is fully understood by both sides, and is workable. Since any agreement raises legal issues, legal review is necessary. In order to ensure that you are not subsequently bound by an agreement that is unclear or incomplete, you should not initial or sign documents during the meeting even if a draft agreement that appears to be acceptable is presented by the other side, or is drawn up during the meeting.

Often an initial settlement meeting does not go as smoothly as the parties had hoped, yet settlement is still a real possibility. You can leave the door open for future settlement meetings by emphasizing that you appreciated the opportunity to meet, that you found the discussion productive even though you know both parties had hoped for more progress, and that you think the parties may well reach agreement if an additional meeting that includes lawyers, key employees, a facilitator, etc. were scheduled. Confirming that both parties see an opportunity for future agreement, establishing a list of issues to be included in any agreement, and setting a timeline for future meetings and actions, can preserve a momentum toward settlement.

5. Protect Your Legal Position In The Event Settlement Is Not Reached.

When one party has raised legal claims, litigation remains a possibility until the claims are withdrawn or a settlement agreement is signed. A waiver of past claims can, and should, be included in any settlement reached. However, until such a settlement is signed, it is possible that these claims will be pursued in the future. The following can help ensure that settlement discussions focus on settlement, not future litigation:

Even though settlement discussions generally are not admissible into evidence, you should avoid statements that could be construed as admissions. You can show sympathy for the other party's view with phrases like "I'm sorry you experienced difficulties", or "I understand that you were angry", instead of phrases like "Yes that was wrong" or "We've had a lot of trouble with that."

At the outset of the meeting, you should also confirm the settlement nature of the discussion. A statement like the following could be used: "I'm glad we were able to get together and I, like you, hope we can resolve our past differences. Since one purpose of this meeting is settling past claims, my lawyers have asked me to confirm that nothing in our discussions will be used by either party as evidence in any subsequent proceeding should we not be able to reach agreement." Even if statements made during the meeting cannot be used as evidence, information gained during the meeting can be used as a basis for future discovery. Therefore it is a good idea to carefully evaluate

whether to bring any documentation to the meeting and to avoid referring to specific documents or evidence that have not previously been shared.