

Settle Up!

Settlement Newsletter



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Good Cop, Bad Cop

Every mediator has done it.

The mediation has begun. The mediator is working hard on building a relationship of trust with the plaintiff (because without such a relationship the mediator can do nothing). The plaintiff takes the moral high ground and flat out refuses to make any opening demand - nothing at all - because they feel so abused by the defendant. They simply refuse to proceed with the mediation.

What can you do? Where can you go? How can you settle a case when the plaintiff won't even make an opening demand?

Everybody's been there. What can you do?

There's only one option: attack the

plaintiff's position. The mediator must help the Plaintiff realize that trial results are uncertain, and the Plaintiff may get a poor result at trial (regardless of how great a case the Plaintiff might think they have).

But a mediator has to do this gently. If the plaintiff feels you're an adversary, you're finished. You must absolutely retain the plaintiff's trust (and at the same time attack their position).

Can this be done effectively? Yes. How? By very gently using a proven, time honored negotiating tactic: Good Cop/Bad Cop.

Two negotiators are typically used in the Good Cop/Bad Cop approach. One negotiator (the "Bad Cop") is harsh, aggressive, demanding, unpredictable. The other (the "Good Cop") is agreeable, cooperative, helpful.

Sometimes the Good Cop even defends the party from the Bad Cop. The idea is that because of this contrast the person feels they can trust the Good Cop (and

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so they are more receptive to negotiations with the Good Cop).

An effective mediator will use this Good Cop/Bad Cop technique to point out weaknesses in a party's position. The mediator will introduce the prospect of losing at trial by pointing out the kinds of arguments the other side might make which might be convincing to a judge, even if the other side hasn't yet made them. In this kind of an approach the Good Cop is the mediator. The Bad Cop can be either the opposing side, or

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a judge (or jury). (Sometimes this technique is referred to as “reality checking” where the mediator points out the realistic likelihood of winning or losing at trial). But regardless of whether the “Bad Cop” is the judge, the jury or opposing counsel, the goal of this approach is the same: it helps the party see the weakness of their position without undermining that party’s trust in the mediator.

When used skillfully, this approach can be very effective in making progress at mediation. It’s an essential tool in the mediator’s toolkit.

The foregoing article is provided for general informational purposes and should not be used in connection with any specific legal matter. Persons with legal issues or matters should consult competent legal counsel.

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