Note from Mediator Phil Neiman

This document contains a series of tools and techniques that will help you analyze your conflict prior to the mediation. Some of the sections simply call for identifying issues, while others involve a more rigorous analysis. You will get more out of the mediation and become clearer about your best approach to resolving the dispute if you write out answers to these questions.

Your responses are private and you will not be asked to give a copy to the mediator or to the other party. Simply bring your worksheet to the mediation and use it as you negotiate. If you are represented by an attorney, it is recommended that you complete this document with input from him or her.

This document is divided into the following eight parts:

1. Negotiation History
2. Interests Analysis
3. Constituencies
4. External Considerations
5. SWOT Analysis
6. Probability-Weighted Settlement Alternatives
7. Roadblocks to Settlement
8. Reservation Price or Walk-Away Point
Part 1 - NEGOTIATION HISTORY

Looking closely at the negotiation history can shed important light on why the parties have not yet reached a resolution to their conflict and will often prove useful in deciding how to move forward.

1. Offers and Demands
   • List the offers and demands made by each party to date. It can be useful to have this in snapshot form; some parties will use a table, chart or timeline.
   • Indicate the forum in which the offers and demands were made. For example, in court filings, direct negotiations between the principals, attorney communications.

2. Strategy
   • Describe the negotiation strategy you have followed up to this point.
   • Describe the other side’s approach to the negotiation so far.
   • How would you characterize your negotiating style?
   • How would you characterize the other side’s negotiating style?

3. Zone of Possible Agreement (ZOPA)
   Based solely on the claims made and the positions taken by you and the other party to date, what do you see as the current zone of possible agreement (ZOPA) for resolving the conflict? The “zone” can include non-monetary categories.

4. Further Questions
   • Have the principals met to discuss the conflict?
   • Why have the discussions not resulted in a settlement yet?
   • If there is currently an impasse, how have you contributed to it?
   • Has the other side engaged in any tactics that are of concern to you?
   • Which side has been more amenable to working out an agreement?
   • Which side has dominated the negotiation?
   • Have your discussions been interest-based or positional?
   • Have you communicated your needs and priorities to the other side?
   • Has the other side communicated its needs and priorities to you?
Part 2 - INTERESTS ANALYSIS

The term “Interests” refers to a party’s needs, concerns, true objectives and motivations. These are distinct from - and generally unrelated to - any demands and offers that have been made by either side.

- Identify as many of your main interests as possible.
- Identify the other party’s main interests as you understand them.
- List some options will meet your interests and those of the other side.
- In setting an agenda for the mediation, what are your top priorities?
- Identify the one thing you want to make absolutely certain is addressed in the mediation.
- Where are the pressures to settle or not settle coming from?
- Are you aware of the internal and external pressures affecting the other side’s negotiation?

Part 3 - CONSTITUENCIES

Each party should consider its key constituencies in relation to the conflict and the negotiations.

- Identify the major stakeholders (e.g., investors, directors, owners, partners, lenders, clients, customers, suppliers).
- Which of these speak with the loudest voice?
- How are the stakeholders affected by the conflict?
- How will they be affected by the settlement?
- Are there pressures to settle or not settle the dispute form any of these constituencies?
- Is there any conflict within your organization regarding how the case should be resolved? Is there a clear consensus?
- Does anyone have veto power over the terms of a mediated agreement?
Part 4 - EXTERNAL CONSIDERATIONS

Identify the external factors that are affected by the dispute or that may have a bearing on the resolution in mediation. For example:

- Are there other current conflicts between the parties?
- How significant is this conflict to each party’s business?
- Is it important to maintain the relationship with the other party?
- If there were past disputes with this party, what was the other side’s attitude toward settlement?
- What is your understanding of the other party’s risk tolerance?

Part 5 - SWOT ANALYSIS

SWOT analysis can be a valuable pre-mediation tool. Parties are encouraged to objectively assess the strengths and weaknesses of their case as well as the opportunities attributable to various settlement options and threats related to the dispute itself. They should also perform a similar assessment from the perspective of the other side to the best of their ability.

Part 6 - PROBABILITY-WEIGHTED SETTLEMENT ALTERNATIVES

To make an informed decision about possible options for resolution in mediation, everyone should consider what happens if they don’t settle. When thinking about consequences of not resolving a conflict, parties often look at their three things: Their best alternative to a negotiated agreement (BATNA), their worst alternative to a negotiated agreement (WATNA) and their probable alternative to a negotiated agreement (PATNA).
Part 6 - PROBABILITY-WEIGHTED SETTLEMENT ALTERNATIVES (cont’d)

In order to streamline the conflict analysis process for less-complex cases, I recommend a different approach, which is a probability-weighted BATNA and WATNA. This involves the following steps: (1) Determine a best-case scenario, which includes an estimate of damages, assign it a probability of occurring, then account for expenses; (2) Determine a worst-case scenario, which involves an estimate of damages, assign it a probability of occurring, then account for expenses; (3) Choose a point (not necessarily midway) between these two figures to negotiate from.

**Probability-Weighted Best Alternative to a Negotiated Agreement (P-BATNA)**
What is the best that a party can expect if a settlement isn’t reached in mediation?

- **Outcome.** Place a dollar value on the award that is your best-case result if you go to trial or arbitration. Take into account all classes of damages as well as offsets and limitations. See the subsection below titled “Outcome – Damages Analysis”. Once this number is determined, assign it a probability of occurring and multiple the two figures. For example, if the best case is $20 million and the likelihood of it occurring is 60% (or a .6 probability), then your figure is $12 million.

- **Expenses.** Determine how much it will cost to get to the expected outcome. Include all relevant expenses identified in the subsection below titled “Costs.” Use your best efforts to assign a dollar figure to the intangible expenses identified in the table.

- **Calculation.** Subtract the expenses from the probability-weighted outcome to arrive at the P-BATNA.

- **Other Party.** What is your estimate of the other party’s best alternative to negotiating a settlement in mediation?

**Probability-Weighted Worst Alternative to a Negotiated Agreement (P-WATNA)**
What is the worst that a party can expect if a settlement isn’t reached in mediation? When considering the options, take into account all of the costs described in the BATNA section above and, for guidance, consider the following as a frame of reference: If you are the defendant and punitive damages are involved, the figure is potentially very large; if you are the plaintiff, the number is $0 minus your costs. What is your estimate of the other party’s worst alternative to negotiating a settlement in mediation?
Part 6 - PROBABILITY-WEIGHTED SETTLEMENT ALTERNATIVES (cont’d)

Outcome – Damages Analysis

The starting point for determining a party’s P-BATNA and P-WATNA is estimating the outcome of the case outside of mediation. This is a damages-based analysis. The determination will depend on the type of claim, for example, if the case is for breach of contract, for personal injury, for patent infringement, and so on. Not all types of damages listed below will be relevant to the dispute nor is this an exhaustive list:

<table>
<thead>
<tr>
<th>Damages</th>
<th>Other Damages Considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restitution damages</td>
<td>Liquidated damages provisions</td>
</tr>
<tr>
<td>Reliance damages</td>
<td>Limitations on damages</td>
</tr>
<tr>
<td>Expectation (direct and indirect)</td>
<td>Duty to mitigate</td>
</tr>
<tr>
<td>Damages under UCC</td>
<td>Interest on damages</td>
</tr>
<tr>
<td>Punitive or exemplary damages</td>
<td>Indemnity</td>
</tr>
<tr>
<td>Loss of earnings (less deductions)</td>
<td>Contribution</td>
</tr>
<tr>
<td>Pain and suffering</td>
<td>Subrogation</td>
</tr>
<tr>
<td>Emotional distress</td>
<td>Comparative/contributory negligence</td>
</tr>
<tr>
<td>Unjust enrichment</td>
<td>Specific performance</td>
</tr>
<tr>
<td>Statutory damages</td>
<td>Contract rescission</td>
</tr>
</tbody>
</table>

Costs

In performing the P-BATNA and P-WATNA analysis, each party must consider both its historical and projected costs. These include:

- Actual cash outlays for legal fees, court costs, expert witness fees, discovery and investigation expenses and travel-related costs, among others and

- Non-cash expenses or intangibles, including opportunity cost, lost management time, resource misallocation (cash used to finance the lawsuit cannot be used for other purposes), relationship cost. This category involves expenses that can be difficult to quantify, but an effort should be made to do so nonetheless.
Part 7 - ROADBLOCKS TO SETTLEMENT

Identifying settlement roadblock in advance of the mediation can help the parties deal with them productively in the session itself. What impediments have there been to date in reaching a settlement? For example, has there been an especially difficult negotiator on the other side? What are the specific barriers to reaching an agreement going forward?

To the extent possible, categorize the impediments as:

- Value disparity
- Information asymmetry
- Relationship conflict
- Organizational conflict
- Interest conflict

Can these issues be handled with:

- Providing additional information to the other side?
- Obtaining additional information from the other side?
- Inviting a particular person to participate in the mediation?
- Excluding someone from the negotiation process?
- Influencing someone in your organization?
- Alerting the mediator to focus on a specific issue?

Part 8 - RESERVATION PRICE OR WALK-AWAY POINT

Each side should know his own reservation price or bottom line. This is the point beyond which the party will walk away from the table and break off negotiations in order to pursue other options for resolving the dispute. For a plaintiff, the number is the least amount he is willing to accept to settle the case; for a defendant, the number is the most he is willing to pay to settle.

- What is your reservation price?
- Has either side communicated a reservation price to the other? If so, when, what was the figure and what was the response?