Tactics & Strategy in Mediations and Negotiations
By Dee Alpert, Esq.

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This article is about about handling mediations and negotiations. These ideas are based on my experience in federal court class action sex discrimination in employment suits, administrative sex and race discrimination proceedings, and special education proceedings of all kinds.

Many years ago, the Harvard Business School did a study on negotiation outcomes. Their rules for "winning" were:

> Never make the first offer.
> Make your first counteroffer extortionate.
> Never make the first concession.

There are many reasons why a school district comes to a mediation:

> To go through empty procedures so that they look reasonable and willing to work things out, when, in fact, they're not.
> To secure information that they can use against the parent in a hearing.
> To get a handle on parent/parent advocate/parent attorney's way of operating/style.
> Because they've been ordered to by the school board and/or outside insurance carrier.
> To see if there's some way to avoid the cost/hassle of a hearing and possible appeal and federal court litigation.
> To try to work things out because they don't want conflict/aren't really sure why the parent is ticked off.

These are also the reasons why you may be there.

Remember: Mediation is voluntary and free (except for your attorney or advocate's fees) so you can/should use it as another way to get what you need for your kid – even if this is just information about how the other side works.

Dealing with Junk Tactics

Unfortunately, many defendants' and school districts' attorneys believe that if they use intimidation to win in the beginning, they can avoid the proceeding entirely. Mediations can be misused for this purpose.
If you run into junk tactics, consider these responses:

1. The good, old fashioned "do it right back" response -- the old Mutt and Jeff routine.
You may get nothing out of the mediation as a result, but that may be okay for you and at least the other side won't think they can walk all over you in hearings or other proceedings. And, depending on where your head is at, you may feel much better on the way home. Better to have the advocate or attorney or other person with you do

this, so they don't get to hate you so much that they'll never work with you reasonably after any settlement or hearing win.

2. Laugh.
Nice, big, relaxed smile and "Oh, come on, don't tell me you're going to play that tacky game." Don't think I'm kidding – if you do it relaxed enough, it can work.

3. Bring food.
Bring candy, donuts, something small and nice to eat. Place a batch on the table and invite everyone to partake. This tactics disarms. And when their mouths are full, they can't yell and make fools of themselves.

4. Bring little toys.
When/if negotiations seem to have been going somewhere and then stall, try this tactic (the favorite of a gentleman named William Ury, former head of the Federal Mediation and Conciliation Service).

Bring a bunch of tiny wind-up toys in a pocket. When tension is high and it looks like someone might throw a punch at someone else, throw the toys on the table, wind them up, and tell everyone that the toys are theirs for the taking. You'll be surprised at what a bunch of adults will do when faced with a batch of little moving toys. Mini slinkys are good, too.

Know Your Lines

The other side has probably worked out roles to play well in advance. You should do this too. Mutt and Jeff is good. Rehearse.

Work out and write down cue lines that tell whomever is with you that they should come in with a pre-rehearsed comment, suggestion or statement. Of course, your follow-up is also pre-rehearsed and you've got it down pat.

This may as simple as reminding the other person with you that since you're going to lose it, they need to step in and take over the conversations for a while.

Or it may be something as nasty as "Oh, so you're in your control and conquer mode again!"(to the special ed director who is sitting across from you).

This may be something like, "Oh, by the way, I've never been able to find the research documenting your program, methodology, etc. What is it?"

You can come up with some good lines that will always get the school's team off balance.

"How much progress do your classified students make in reading every year?"

"How many disabled students graduate with _____ (college prep.) diplomas every year in your district?"

“Well, we know the feds require that districts have outside, independent evaluations of their Title I programs every year. So, how much progress do kids in your Title I program make every year in reading and math?”

“How many disabled kids do you declassify each year?”

If the district’s lawyer has lost a noteworthy case lately, be sure to ask about it.

If the district’s budget is in trouble, ask whether they expect special ed parents to support the budget – and why.

Ask about a proposed bond issue for new construction and whether there was community support for the bond.

If relevant, ask if their sped folks are still practicing medicine without a license. Point out that Connecticut just barred school staff from recommending that parents have their kids put on Ritalin. Ask if their insurer has told them about this practice.

I’m not suggesting that you really do this, but you will feel better knowing that you can if things get too tough – or too nasty.

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Know What You Want

Of course, you’ve worked out your list of:

- Absolute minimum stuff – really critical – without which you won’t settle.
- Nice stuff that you can, if necessary, do without.
- Junk demands (including truly extortionate stuff) that you will use as “throw aways.”

If the other side demands to know why you want something, you may say, “Well, if you want to get technical, we should do it in a hearing” -- so you avoid giving away important information.

Points to Consider

1. You can ask for things in a mediation that you cannot get or would not be entitled to in a hearing.

For example you can ask that a specific outside person be appointed as a binding decision-maker for the next year when the parties cannot agree on something (if there is a cost, this would be at district’s expense). You may ask the district to pay for a specific person to do something for the child, in or out of school.

2. Whatever the cost to you, there is always a cost to the other side in litigating. This cost may (or may not) be much, much higher than yours.

3. If necessary, you can say things in mediations that aren't true but may make the other side believe that you're going to cost them a fortune. For example, "Well, I've got five experts who think otherwise. But we can deal with that in the proper arena."

4. If you have a real control freak on the other side (sped. administrator, superintendent . . .) and it is unlikely that settlement will solve the real problem, ask for specific protections against retaliation and harassment in any settlement you work out, with financial penalties for violations and an outside independent person to decide the issue without having to go through another mediation and hearing. You may also consider asking that someone other than the control freak be appointed to handle your child's special ed issues in the future, without any intervention from the control freak, whoever it is.

5. Don't be afraid. Nothing that happens in a mediation is binding. You can make every mistake in the book – and make the other side think that they're going to walk all over you in a hearing – learn from your mistake(s), do everything completely differently in a hearing, and blow them away. In fact, if you don't think mediation will work, you may consider doing this intentionally – coming on like a turkey who knows zip, then give the other side a very unpleasant surprise in the actual formal proceeding.

6. When you can't sleep the night before and have more doubts than Swiss cheese has holes, remember the words of Hillel:

"If not you, who? If not now, when?"

Go for it!

About Dee Alpert, Esq.

Dee Estelle Alpert, Esq., is a New York City-based attorney who handles cases throughout New York State. She has acted as consulting counsel in special education cases nationally. She is also a hearing officer certified by the New York State Education Department.

Dee began looking at special education law when her son was five and was diagnosed with Tourette Syndrome. Fortunately, his disability was mild. Later, Dee was the first parent to secure a Section 504 Plan at New York City's Stuyvesant High School.

During a 12-day impartial hearing for a family, Dee decided that attorneys with litigation skills take special education cases to protect parents and children from a system that seemed designed to deprive them of their most basic rights and dignity.

Currently, Dee is focusing on systemic special education and education issues and tactics, including various inquiries into special education and public school district financial and related corruption. She works with a retired Professor of Education Finance, and has provided consultation to various New York prosecutors and politicians.

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