

Kluwer Mediation Blog

Practical Tips for Mediators: Parties Who Take Cold Feet

Charlie Irvine (University of Strathclyde) · Sunday, October 10th, 2021



It's been a while since I wrote about [practical tips for mediators](#). Yet when I ask people what they want from training or teaching the commonest answer is... practical tips. I offer some below on working with parties who take cold feet just as resolution is approaching.

I was recently asked to speak with lawyers and mediators in India on [Cold Feet Settlements](#). We all know that tantalising sense that settlement is close and suddenly it's 'one step forward, two steps back.' People change their mind. Or maybe they just think a bit harder, or need a further concession to complete the 'Negotiation Dance.' (1) In this blog I share four tips that have helped me respond.

The Frame: Chess

The frame through which we view something influences how we approach it. You can place a lot of frames on mediation: alternative to litigation, chance to talk, facilitated negotiation, dry-run for court. The frame of ‘chess game’ helps us think about decision-making. The permutations are vast. After the first couple of moves our best-laid plans go out the window and it’s a white-knuckle ride to respond to the other side without blundering. And mediation, like chess, has distinct phases. The opening is something of a set piece; the middle is complex and messy; the endgame quite different.

Merriam Webster defines the endgame as *‘the stage of a chess game after major reduction of forces.’* It can seem repetitive and requires patience. In mediation, as in chess, things start to become clearer, especially the gap between parties. It is seductive for the mediator to grab any remotely realistic proposal as soon as it’s offered and convey it to the other side.

Experienced mediators do something different during the endgame. They shift from optimist to pessimist. They ask probing, difficult questions: ‘how is that going to work?’, ‘how will your directors/partners/colleagues respond?’ They may even risk asking: ‘if the other side agrees to this, will you be able to walk away without it rankling?’ This counter-intuitive approach helps avoid cold feet by resisting obvious ‘meet-in-the-middle’ solutions. The closer we get to agreement the more this matters. Mediators are pragmatists, and want to know that agreements will stick. Parties who have talked through the consequences of a given proposal are less likely to fall prey to the subject of the next tip: buyer’s remorse.

Buyer’s Remorse

We all know the feeling. You work hard to find the right purchase at the right price. You buy it and take it home (more likely click on the ‘buy’ button and it’s delivered to your door.) As you unwrap it doubts set in. Does it do what I expect? Does it look good? Is it really an improvement on the old one? Worst of all, could I have found it cheaper somewhere else? This is called buyer’s remorse. The helpful [Wikipedia entry](#) explains that it is often associated with cognitive dissonance. Cognitive dissonance is a much studied psychological phenomenon that goes like this: things are not as I want them to be – I can’t change the things – therefore I change how I think about the things.

What can mediators do? First, prime for it. Some years ago I started mentioning buyer’s remorse in my pre-mediation conversations. I explain that reaching a resolution can be a huge relief but to watch out for a slump the next day. Parties may start to think of all the reasons they were in a dispute to begin with, or how much they conceded, or what the other side got away with. I draw a U-shape with my hand and suggest they wait at least 24 hours for their mood to stabilise before deciding to go back on what they’ve agreed.

Second, emphasise the reward. Buyer’s remorse strikes particularly hard when, relative to their benefits, purchases take a lot of effort, or the purchaser has a lot of choice (and thus more responsibility) or has to make a major commitment. The smart mediator focuses on the potential reward, particularly when things are fraught. Even though it’s tempting to rehearse the bad things that will happen if we DON’T settle, it may be more useful to ask a question like: ‘What will you feel like tomorrow if this dispute comes to an end?’ One caveat: just like in chess, timing is everything. Only ask this question when settlement is in sight.

Partnership

This tip applies to mediators and lawyers: work in partnership. Though you have distinct roles in a mediation, each can respectfully use the other to minimise the potential for cold feet. Mediators do well to view lawyers as allies in the search for settlement. It may make sense to speak privately to one or both, setting out your concerns and asking for their thoughts. Ask their permission to pose difficult questions in front of their clients. This has the double benefit of showing their clients how hard they are working and letting the representatives set out the more tricky and challenging aspects of the dispute.

Be open to creativity. Sometimes the most useful step is to bring the principals together without representatives (on occasion without the mediator) and let them bridge the gap themselves. It's a good idea to keep the representatives on board by explaining what you're planning to do. They may well reciprocate with suggestions of their own

Turning to lawyers (and any other representatives in mediation) it is very helpful when they've done their homework and prepared a range of potential scenarios. The really smart ones continually revise these as we go, meaning that at any point the mediator can ask questions like 'if the other party changed this component of their offer, what are the implications for your client?' or 'what would need to happen for your client to move further on that part of the negotiation?'

Steer In

The last tip applies any time you encounter an impasse. Steer into conflict. Mediators need to be courageous and avoid the temptation to sweep disagreement under the carpet. This too is counterintuitive. If you sense resistance, don't argue, ask. Use the 'empathy loop' (2) to clarify what's going on. That gives you precious information about the source of resistance. Then you can start to address it, reducing the potential for impasse and, later, cold feet.

You can also steer towards other players in the dispute. Is there someone not in the meeting whose opinion matters? Ask if they might be invited or at least consulted. If that requires more time, don't worry. This expands the range of perspectives and helps reduce the party's anxiety that they'll be criticised for settling. Colleagues, partners and critics will still be there after the mediation whether they're invited to take part or not. It's often better to face what they have to say head-on while there's still time to address it.

Conclusion

It goes without saying that these tips can be applied more or less skilfully. There are no magic bullets for parties who take cold feet. Effective mediators treat their clients with respect, and their 'moves' tend to be offered provisionally. If one thing doesn't work, let's try another.

Re-reading this post I detect an overarching belief that underpins most mediation practice, and tends to grow with experience: this is not my dispute. A mediator's intervention is but one plot twist in a long and often painful narrative. We need the humility to accept our limitations. I often start mediations by telling parties 'I will assume that when you say something you have good

reasons for saying it.’ If people choose not to settle and I’ve helped them think clearly and carefully about their reasons, my work is done.

Let me clarify: I love it when cases settle. I’ll do everything I can to help bring that about. But if it doesn’t, I willingly pass back to the parties the one thing any mediation implies: responsibility.

Footnotes

(1) The negotiation dance is a term I first read in Howard Raiffa’s work, describing how negotiators often make a series of moves that lead inexorably towards settlement. There’s a great example in [Rick Weiler’s Kluwer blog on Patience](#).

(2) This consists in three steps: ‘i) *You inquire about a subject or issue*; ii) *the other side responds*; iii) *you demonstrate your understanding of the response and test or check that understanding with the other person*’ Mnookin, Peppet and Tulumello (2000) *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. Cambridge MA: Belknap)


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