For the last several years, I have been developing a concept in mediation that I call “The Pivot.” It is when and why the mediator begins to segue from the facts, law, and emotions of the case to more exclusive negotiation of the dollars and terms that will be necessary to settle the case. My focus is mostly employment and civil rights cases, but the Pivot should be applicable to all sorts of commercial and class action cases as well.

The Pivot differs in every case and may even differ in each caucus room of the same case, but it is nonetheless crucial to whether or not the mediator eventually closes the deal. It centers on the concept that, for each side in a mediation, whether in joint or private sessions, there is a precise and essential time to “switch to the numbers,” moving the parties from the purely emotive to the generally calmer, business side of resolving the dispute. From that point, it is less about risk and what’s fair or true, and more about the realities of getting the deal done. This is pretty elementary in theory, but the skill and nuance comes in developing the instinct and intuition to know exactly when to do this.

It requires a Goldilocks-type analysis: not too soon, but not too late. It has to be just right or the porridge will simply be too hot to handle or too cold to swallow. If the Pivot comes too early, the mediator seems poorly prepared and insensitive to the needs of the parties or to the requisite amount of showmanship sought by an individual attorney who seeks to impress his client and take credit for a good result. Conversely, if the Pivot is delayed too long – and that distinction can be quite exacting in a particular case – then the mediator may be too late to grab the reins and steer the horse in the direction it needs to go.

The difference between turning the corner at the right time and doing so too late, can be the difference between transitioning into a more logical examination of alternatives and settlement objectives or dealing with parties or counsel that have gotten themselves so worked-up that they cannot function rationally at that session. It may be the difference between settlement that day or the mere hope of setting a second session that itself might not succeed because of new irritants or positions that are developed (artificially or not) before the parties reconvene, assuming they even choose to do so.

The moment to Pivot is always a bit of a gamble, for which I take 100% personal responsibility. You can’t wait for the parties or their lawyers to tell the mediator when to switch gears because, frankly, they usually do not know. And sometimes you don’t know right away whether you picked the right moment to Pivot or made the proper transition except in hindsight after the day is complete. But generally there is no turning back once you make your Pivot. To revisit the factual or legal disputes while firmly within the “negotiation phase” can sometimes be disastrous and certainly frustrating. To wait until too late in the day to start to exchange serious numbers and terms can make that attempt futile.

The satisfaction that comes from doing it right is great and constitutes the sometimes thin margin between a day of accomplishment and a day of anarchy and frustration for all concerned. I suggest that those of you who mediate make a habit of keeping track of this elusive juncture in your own cases and reflect afterwards on whether you pivoted too soon, too late, or nailed it just right.

How has my own sense of “when to pivot” and “when to wait” evolved over the years? While the ultimate determination remains primarily intuitive on my part, I have since developed certain tools to safeguard against a premature or damagingly-late invocation of the pivot itself in particular cases. While it is rarely too early “to go to the numbers” if both sides are ready and eager to do so, I nevertheless
employ a form of gut-check by transparently explaining the pivot concept itself to each of them and inquire whether they have any remaining needs to establish or challenge the “facts” beyond what has already taken place. If it appears that they still need to continue in the argumentative process, rather than agree to disagree, I tend to back off for a while and allow them to continue to do so.

More typically, I will experience a situation where one or both sides are yet willing or able to proceed to with a reasoned financial negotiation and require that I become more pro-active in accelerating their readiness to bargain. I do so by striving to minimize the extent of actual agreement that is necessary for resolution at the mediation, pointing out that they need not agree on all of the facts or issues in order to agree upon a common number that works in both rooms (for whatever reasons) and allows them to move on with their lives. No one need “change their minds” or “admit that they were wrong” about anything; at most, they need only acknowledge that, rightly or wrongly, a jury could (incorrectly) agree with the other sides position and render a verdict against them.

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