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Anchoring Mediation in the Merits: A Practical Approach for Neutrals

By Steven M. Greenspan

September 30, 2025

In complex disputes, mediators sometimes fall into the trap of rushing too quickly toward numbers—talking demands, offers, and bottom lines before the mediation has even had a chance to breathe. In my experience, that's the fastest way to push parties into their corners, where they get entrenched and start treating the process as just another skirmish.

I take a different approach. I stay tethered to the merits for as long as possible.

When parties show up at mediation, they often want to jump right in with a "What's the demand?" As a mediator, I resist that pressure. Instead, I encourage everyone to focus first on where there is agreement. Even in the most hotly contested cases, there are always facts or legal principles that no one is disputing. Identifying those and getting parties to acknowledge them creates momentum toward a fair settlement.

Maybe everyone agrees that a particular contract governs, or that the law of one state applies, or that a certain crucial event happened on a specific date. Those are building blocks. They provide a constructive platform to move forward.

Courtesy photo

Steven M. Greenspan of Greenspan Mediation Services/FedArb.

Once the foundation of agreed facts and legal principles are set, I move to the other side of the ledger: the issues truly in material dispute. I push the parties to identify the key issues that, if resolved one way or the other by a court or jury, will impact the outcome of the case. Put differently, I work with the parties to reach some alignment on the disputed issues that actually move the settlement valuation needle.

That step is critical. It forces the parties to narrow the case to a small number of real disagreements—the ones that actually drive value. In my experience, that set of important disputed matters is always far more limited

than the sprawling list of grievances and arguments that litigants initially present.

When we're aligned on those material issues, the mediation can shift gears. In separate private sessions, I explore with each side the relative strengths and weaknesses of their positions. Only then—when the groundwork is in place—do I move the discussion to numbers. At that point, the offers and demands are tethered to something concrete: a thoughtful and objective evaluation of the issues that truly matter.

I've found that this approach dramatically increases the chances of resolution. It keeps the process anchored in the merits of the case, rather than in abstract horse-trading. And, by focusing on the issues that are true value-movers, the emotions that often can be an obstacle to settlement are calmed. For example, I helped to resolve an insurance coverage dispute only after I was able to get the parties to agree that while the case involved many contested issues of fact and law, there were only three reasonably possible results at trial, each with a corresponding dollar impact. In the mediation of a toxic tort case, a settlement was not possible without first getting the parties to agree that, even if the jury found liability, it likely would not award punitive damages. Last, in an employment discrimination case, no progress toward the eventual settlement was made until the parties agreed that judge would almost surely let the case get to the jury on the issue of intent, and that the case likely would rise or fall based on the credibility of one key defense witness.

One more point: I don't waste time in mediation sessions repeatedly reminding sophisticated parties about the generic benefits of settlement—certainty, finality, cost savings, reduction of burden and risk avoidance. They already know all that. What they need is a mediator who helps them see, with clarity, the core factual and legal issues that will determine value.

That's the job. Stay tethered to the merits, and the chances of a successful mediation go way up.

Steven M. Greenspan *of Greenspan Mediation Services/FedArb, has participated in hundreds of mediations over his 40-year career. He evaluates cases based not only on the facts and the law, but also informed by hi assessment of how effective the parties' arguments would be in a courtroom.*