



MAKE THE MOST OF YOUR MEDIATION: SEAL THE DEAL

By Hon. Lynn Duryee (Ret.)

It sometimes happens that, despite the best efforts of all participants, negotiations grind to a stubborn halt and disappointment sets in. Before packing your bags, ask yourself these five questions. Your answer might be just the spark needed to rekindle talks.

1. What is my real cost of going forward? At the beginning of the day, you likely fixed a number against which you would try the case. By the end of the day, you know your opponent's best number. You could reflexively reject it if it doesn't match your number, or you could (wisely) compare the dollars on the table with the true cost of going forward. Your calculation should include attorney's fees, expert and other litigation costs, risks of trial, benefits achievable by settlement but not by litigation (e.g., confidentiality) and—one often-overlooked factor—the investment of time by the client. A comparison of the actual deal now with the cost of going forward gives you the most accurate way of evaluating the current deal. You might discover that you are closer than you think.

2. Have I fully discussed the risks of going forward with my client? Lawyers specialize in championing their client's cause. They see all the strengths in their client's case and all the weaknesses in their opponent's, and they will zealously pursue the client's quest for justice. These qualities, while admirable, sometimes make it difficult for the lawyer to fully discuss problems in the case for fear of appearing disloyal or doubtful. If this sounds like you, enlist your neutral's assistance. Even sophisticated clients have a hard time understanding how one could lose a (seemingly) slam-dunk case or why a jury could award less than the offer on the table. Put your neutral to work by having her objectively discuss with your client the weaknesses in the case and the risks of trial.

3. Am I contributing to an impasse? Litigation is often compared with war, and for good reason. In an effort to win, each side battles to promote its position and annihilate the other. Casualties occur in the form of

insults exchanged, tempers lost and enemies made. Lawyers can carry these wounds into settlement negotiations, undervaluing communications from the other side because of a personal sense of injustice. In the unlikely event that you have lost your professional objectivity, take a few quiet minutes to return to your best self. Make sure your client understands that it is his decision to settle and that he is in no way letting you down by choosing to end the litigation.

4. What further information might change my evaluation? Mediation often marks the first time the parties have tried to resolve their case. It is not surprising, then, when one or more parties discover that they lack important information to reach a final settlement. What do you (or your opponent) need to evaluate the case more accurately? An appraisal, doctor's report, deposition, financial statement or ruling from the court? If you find yourself in this situation, use your mediator to help you create a set of agreements for further work on the case, with a promise to resume settlement talks once it is completed. The mediation is not terminated, but adjourned, so that the case can settle at the next session.

5. What haven't I thought of? You know that morning-after-the-party experience when you think of just the right rejoinder to the sly dig of your dinner partner? If only you had thought of that the night before! Similarly, experienced negotiators wake up the morning after a failed mediation with several strategies they might have tried if only they'd thought deeper. It pays to stick around. The longer participants remain at the table, the more likely they are to stumble upon a solution. What solution have you not considered? Perhaps there are non-monetary terms that might be important: an apology, letter of recommendation or dismissal of a related case. If the shortfall is money, is there a payment plan that would work, is security available or could litigation costs be paid? Like Sherlock Holmes, who solved a murder by noticing that the dog did not bark, notice what outcome you

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have not considered, thereby saving yourself the agony of discovering it the following morning.

Ideally, negotiators are able to maintain momentum and continue talking until resolution is reached. But in real-world cases, participants find that “impasse happens.” When it does, be ready to ask these five questions. Your answers may well move the case to resolution. ■

Hon. Lynn Duryee (Ret.) is a San Francisco JAMS neutral who joined after serving on the Marin County Superior Court for more than 20 years. She presided over and settled thousands of commercial, contract, and negligence cases, along with every other type of civil case filed. She can be reached at lduryee@jamsadr.com.