



# Don't be the terminator

## This story is for you if...

- Mediators call an impasse too early;
- The timing is not right for settlement on the day of the mediation;
- You have not yet revealed to the mediator your ultimate objectives.



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### The problem

After going through the preliminaries in a mediation, it appears through a couple of rounds of negotiations that the parties are far apart in their evaluation of the case. The mediator is running out of options, and you can tell that he is about to call it a day. This is frustrating to you in that you have not yet revealed to the mediator a more reasonable position than you have stated in your various demands. In addition, there may be some additional information that is available either that day or through further discovery that could legitimately transform your opponent's evaluation into a more favorable position to you. Nevertheless, the mediator is about to terminate the negotiation.

### The solution

Be proactive in the process by meeting privately with the mediator and suggesting an "adjournment" as opposed to a "termination" of the session. The word "termination" has a negative connotation in that it suggests that efforts to settle have been concluded, when in fact there may be other reasons to maintain a settlement process that the mediator has not considered.

For example, if it is clear that the parties are simply not in the same ballpark or value range, there are probably several impediments or barriers that have prevented the parties from getting closer in their numbers. Identifying those barriers and allowing the parties an opportunity to reassess the case is critical to

the settlement process. A private meeting with the mediator would be recommended in order to discover whether the mediator has simply given up on the process or has failed to learn what those barriers are and how they have gotten in the way of progress. If, for example, your opponent is questioning the nature and extent of a loss of earnings claim or need for future surgery, a better practice would be to have the mediator adjourn the mediation and give the parties an opportunity to conduct specific inquiries into this information or voluntarily provide the information directly to your opponent. While this sometimes requires you to fill the role of both advocate and mediator, it is necessary to not let a weak mediator get in the way of moving the case forward.

The key here is to determine what steps need to be taken before giving up all hope that the negotiation process is concluded. The best practice is to have the mediator suggest an adjournment as opposed to a termination with specific instructions to the parties to gather additional information for evaluation purposes. The mediator would then develop a schedule for assessing that information and making either recommendations or reconvening a second session.

*Jeffrey Krivis mediates complex disputes in Carmel/Monterey including class action, toxic tort, entertainment, insurance and business. Krivis is the author of "Improvisational Negotiation," (Jossey-Bass 2006) which received the prestigious 2006 Book of the Year Award by the CPR International Institute for Conflict Prevention. He has taught at the Straus Institute for Dispute Resolution at Pepperdine Law School since 1994.* ☒