

SEPTEMBER 2014



Overcoming impasse

Ten strategic moves to make when negotiations grind to a halt

Hon. Lynn Duryee (Ret.)

What can lawyers do to help their case reach the finish line at mediation? Neutrals endeavor to make settlement happen; still, no one knows the case and client as intimately as the lawyers. Here are some tried-and-true strategies the skilled lawyer might try next time negotiations grind to a discouraging halt.

1.Take a breather

Experienced judges will tell you that their go-to tool for troubled times is a recess. They have learned that a short break is the most efficient and effective way for participants to repair short tempers, regain professional distance, and reignite enthusiasm. This tool is equally effective in a mediation setting. When participants are under stress, the easiest answer to give is "no."

Next time your client (or opponent or neutral) starts showing the strain of stressful negotiations, why not suggest taking a break? Ideally, you could go outside with your client, walk around the block, maybe pick up a piece of fruit or fresh coffee. Talk about the weather, your favorite Netflix series, your kid's school play – anything at all but the case. When you return to the conference room, you will both feel energized and optimistic – and will likely have a whole new idea of how the case might settle. Like a good night's sleep, a short recess will help solve problems while you're not thinking about them.

2. Switch the setup

Most mediations these days are done in separate caucuses. This allows the mediator to convey information in the best possible light, and it allows each side to spend the day in its own comfortable and confidential camp, free of the tension caused by sitting face-to-face with the adversary. As long as it's working, this setup is great. But when negotiations begin to falter, it might be time to shake things up. Perhaps you have been wise enough to cultivate a good relationship with the lawyer on the other side of your case. Might it spark negotiations for you to talk to her directly? The two of you may be able to discuss why negotiations seem sluggish and what can be done to improve progress. Or perhaps you have prepared a settlement video or PowerPoint presentation. Would it be worthwhile to meet in a joint session so you can play the presentation for your adversary? Maybe the adjuster would benefit from meeting your client. Assuming you have prepared your client for this event, you might request a joint session for that purpose. If you have a multi-party case, you might suggest settling with one player. Even the settlement of a very minor player can have a salutary effect on global negotiations. Finally, while it is true that mediation works best when

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



decision-makers are part of the process, there are times when enormous progress can be made when just the lawyers meet privately with the neutral. Such a gathering may encourage frank or lighthearted exchanges that spark new strategies. After all, as lawyers you have been working together for months and you have superb knowledge of one another as well as the strengths and weaknesses of the case. When the status quo stops working, switch the setup and try something new.

3. Bid against yourself [sort of]

Lawyers hate to bid against themselves. It offends them deeply, goes against their dearest-held principles. Even when lawyers start to suspect they may have begun negotiations at an unreasonably remote number, they can't bear the idea of giving a new number when the other side has offered nothing. If the other side isn't willing to move unless you move, and if you aren't willing to bid against yourself, where are you? Impasse – and that's never good. Instead of holding on to your principles, consider making another move. It doesn't have to be a big move, it just has to be a move. By giving your neutral something to work with – something other than the shop-worn, "I'm not bidding against myself," you are helping your case build momentum, a powerful force in negotiations. So go ahead: Break the rules just this once and see if that doesn't recharge negotiations.

4. Propose a bracket

While it is true that many cases settle with adversaries exchanging demands and offers in incremental moves, it sometimes happens that participants grow impatient of taking so many steps and weary of remaining so far apart. In these circumstances, a bracket might help jump the parties into shouting distance. You might ask the mediator to deliver a bracket to your opponent – say, "Plaintiff will drop to $300,000 if defendant will go to $100,000." It is sometimes helpful to add that if the other side accepts your proposed bracket, you will make the next move after that. Also, if you propose a bracket, you may want to warn the mediator that you are not agreeing to settle the case at the midpoint (in this example, the midpoint is $200,000). If it's the other side that is initiating the bracket, you can either agree to their proposed bracket or offer a different bracket in response. Bracketing can be an efficient and helpful tool for parties to leap into an enticing settlement range.

5. Discuss non-monetary terms

One quality of successful mediations is engagement. At some point, the settling parties engage in the process and connect with the mediator. The parties may not trust one another, but they trust the process and their ability to reach a deal. One way to engage parties in the process is to talk about something other than money. What does the release look like? When will the money be paid? Is there a confidentiality provision? Who are the payees on the check? Are there documents that need to be destroyed? Who pays for the mediation? One effective technique has the parties working jointly on a term sheet, so that at the end of the day, the only thing left to fill in is the dollar amount to be paid. At that point, the parties are invested in the process; they have been so successful at reaching agreements that settling on a number is mere child's play. When discussions about money are going nowhere, be the first to change the subject.

6. Make it real

Sometimes the challenge isn't with the other side but with your own client. The client may have a firm idea of what the case is worth without considering what the money means to him or why his evaluation may be unrealistic. For whatever reason, the client feels that his case is "worth" a certain amount. As a result, the lawyer may be disinclined to recommend lower numbers for fear the client will feel disappointed or, worse, betrayed. One useful tool in this circumstance is to "make the money real." When a fair number is proposed during mediation, calculate how the money would be disbursed. Then discuss with the client how he might use the money. Maybe he could buy that new pickup he's seen advertised during baseball games, or pay off the irksome second loan on his house, or take his family for a 10-day trip to Hawaii. Let the money represent something tangible and real to your client. This might also be a good time to enlist the neutral's assistance to discuss with the client the non-monetary benefits of settlement – not only does the client get to own the new truck, but he doesn't have to answer any more interrogatories – the settlement rewards him with peace of mind. Instead of settlement being an abstract number and concept, make it real for the client.

7. Tell the neutral what you need

As your mediation plays out during the day, pay close attention to the obstacles in your camp. Does your client need to feel that she has been heard and understood? Is your client nervous about settling her case when her future medical care is uncertain? Does your client feel she is letting down her overly-invested father by settling her cause célèbre? Is your client refusing to acknowledge the risks of going to trial? Are you experiencing client control issues? Identify the obstacles and enlist your neutral's help. The neutral is in a good position to bolster your wise advice and deliver tough news to your client. It is critical, however, that when the neutral delivers the bad news to your client, you let her do so without interruption or argument from you. This is far easier said than done – lawyers instinctively want to protect their client and counter the weak points in the case. Not surprisingly, it can be helpful for the lawyer to acknowledge the wisdom of the neutral's observations. During the day, be on the lookout for difficulties in your camp, and ask the neutral to help you handle them.

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



8. Compare money now with money later

Let's say your client firmly believes his case is worth $100,000. No matter that you have spent hours with him reviewing a contrary evaluation based on your experience and recent verdicts and he arrived at his opinion after listening to his barber and doing research on the Internet. You think the case is worth $75,000 soaking wet, and that is the offer on the table. Ask the neutral to guide you through an exercise in front of your client where you demonstrate that $75,000 now has almost exactly the same value to him as $100,000 from a jury (once you factor in expert fees, court reporter fees, jury fees, increased legal fees, and so forth). Victory! As a bonus, the client is eliminating all risk, avoiding trial and appeal, and will receive a check in 30 days. Get your client unstuck from his demand by comparing the net to him now with the net to him after the expenses of trial.

9. Persevere

It is easy to feel discouraged when negotiations stall, and it takes superhuman effort to maintain optimism. Happily, that optimism pays off more often than not. The simple truth is, reasonable people can settle their case, and the longer that people stay in the room and try to settle, the more likely they are to find a way to do it. Encourage your client to stay in the room for as long as it takes. Restrain yourself from casting aspersions on your adversary. Assure your client that bumps in the road are par for the course, and the frustration he feels is natural. Above all, resolve that you will never be the person who gives up first. The lawyer who packs up his bag and leaves in a huff might enjoy a moment of door-slamming drama, but the lawyer who perseveres is far more likely to achieve settlement. Fasten your seatbelt and enjoy the ride.

10. Self-monitor for embroilment

Mediations can be emotional, frustrating and exhausting events. Clients frequently experience anger, confusion and disappointment. It often feels like the opponent is unreasonable, uninformed and obstreperous. Yes, you strive to be consistently polished and professional as an advocate; still, you must consider the possibility that some of these strong emotions are affecting you. During the day, take a few minutes from time to time to ensure that you are being your best self. You want to make sure that you, in your pursuit of justice for your client, have not preempted your client's role. For example, it sometimes happens that the client wants to settle but the lawyer has become so embroiled in the cause that he is pushing for a certain result, and the client is rejecting offers not because she wants to, but because she thinks her lawyer wants her to do so. Maintain your effectiveness and ensure your client's satisfaction by checking in with yourself during the day. Take whatever steps are necessary to regain your professional distance. One way to instantly improve your demeanor is to imagine that a beloved child or revered mentor is observing you that day. By implementing a practice of self-monitoring for embroilment, your advocacy will remain optimal, and, as an added bonus, you will feel better about yourself at the end of the day.

Summary

Mediation advocacy is an art that may call upon your skills as a diplomat, counselor, observer, friend, lawyer and clairvoyant. The tool that gets the job done on one case may have no effect on the next one. The brilliant tool that works so well for you may crash and burn in the hands of another. Over time, you will come to rely on some tools to the exclusion of others. To grow in your skills as a negotiator, consider keeping a notebook of your mediation experiences. Each negotiation offers a valuable lesson to be learned. If you settled the case, what worked for you? What might you have tried that you didn't? If the case didn't settle, what went wrong? Did you give up too early? Were you embroiled? In retrospect, what might you have done? Whether the case settled effortlessly or failed spectacularly, something happened that can help you grow in mastery as an advocate. Develop a practice where you identify it, record it, and learn from it. By practicing these tools and recording your progress, impasse will become, well, a thing of the past.


Duryee

Hon. Lynn Duryee (Ret.) is a JAMS neutral, based in San Francisco. She served on the Marin County Superior Court for more than 20 years where she presided over and settled thousands of commercial, contract and negligence cases. She can be reached at ldduryee@jamsadr.com.

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**