



## MAKE THE MOST OF YOUR MEDIATION: EFFECTIVE NEGOTIATIONS

*By Hon. Lynn Duryee (Ret.)*

Wouldn't it be great if at your next mediation your client left satisfied, you felt valued and the case settled at its best number? Here are five tools lawyers can use to set up such an outcome:

**1. Bring everything you need to settle completely.** Before the mediation, think about what you will need to settle the case in its entirety. Perhaps it is a document, such as a settlement agreement, release of lien, escrow instructions, quitclaim deed or dismissal with prejudice. Maybe it's your client's checkbook or certified funds. Perhaps it is something intangible, such as tax advice or a reduction of a medical lien. Whatever your case might need to settle it once and for all, have it with you at the mediation. If closing documents require notarization, arrange to have a notary at the ready. The best time to hammer down loose nails is when parties are face-to-face and focused on resolution. Knowing in advance what you need to settle reduces the possibility of overlooking some detail and gives you a template for working with your opponent. Plus, it really enhances the giddy factor when, for example, the contractor walks out with a check in his hand and the homeowner has a notarized release of mechanic's lien in hers.

**2. Give the case your full attention.** Sure, you can spend the day playing on your cell phone and billing other files, but if you give your client your full attention, you will increase your client's satisfaction as well as the likelihood of settlement. Why? Because engagement is magic. If you think about the most exhilarating moments in your life—whether you were trying a case to a jury, delivering a baby or watching Game 7 of the World Series—you were giving 100 percent of your effort to that important moment. Do the same for your client during his mediation. Attend to his needs. Be patient in explaining the ups and downs of the day. Let him grouse for the hundredth (and hopefully last) time. You will learn more because you're listening deeply, improve your thinking because of your single focus and enjoy yourself because you're on fire. Doesn't that sound better than another round of boring solitaire?

**3. Say it with pictures.** As lawyers, we believe in words. We love them! Can't get enough of them! So we often forget that seeing is believing. How can you best illustrate your case? Day-in-the-life videos are awesome, but not every case merits an outlay so time-consuming and expensive. It could be something as simple as enlarged color photographs (not the usual black-and-white photocopies better suited to a Rorschach than a visual aid). What about a brief PowerPoint with pictures of the defects? Or a video showing the cows' trespass on to your client's property? Or a mockup of the defective product? Visual aids are a great tool for the joint session because they're efficient, interesting and persuasive. So save your breath and say it with pictures.

**4. Create ground rules.** Most clients will participate in one mediation during their entire life, but even if you represent a sophisticated litigant, you will enhance productivity and effectiveness by discussing some ground rules with your client. These might include the following:

- We will use all our time productively. The mediator will be spending substantial amounts of time in the other room. We will use that time to review talking points and to plan our next move and be ready to respond when the mediator returns.
- We will take every change of position seriously. Even if it's disappointing, even when it falls short of what we hoped, we are going to see it for what it is: progress.
- We will not demonize the opposition. It's easy to view every move they make through the lens of bad faith, but for today, we are going to believe that we're all here to settle the case.
- We will not feel insulted when they don't do what we think they should do. Well, maybe we will feel insulted, but we promise to get over it quickly. We recognize that settlement is a process, and where the parties are in the morning often bears no relation to where they are in the afternoon.

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**5. Learn something new.** One gift that often goes begging at mediation is the opportunity to learn something new. It could be something new about the opponent's case, something new about your client or something new about yourself. Make a point of accepting all the gifts the day has to offer. During the mediation, the neutral will be giving you news from the other side. Instead of reflexively rejecting it, why not take it in and consider it? Or maybe your client is falling apart at the seams. Instead of heroically patching her up, explore what is happening with her. Have the courage to delve into that uncertain emotional territory. Or—eek!—maybe you find yourself growing uncharacteristically short-tempered. Instead of glossing over it, take a moment to notice your reaction, make a note of what is occurring so you can figure it out in a calmer moment, and give yourself a little pep talk so you can return to being your best self.

By using these five tools, you are setting the stage for a productive day. Your client will feel heard and understood, you will maximize the opportunity to learn about your case from your client and your opponent, and you'll go home feeling like you've done a good job for justice. Nice day's work! ■

*Up Next: Make the Most of Your Mediation: Seal the Deal*

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