

Settle Up!

Settlement Newsletter



April 2019

Mediation's "Soft Considerations"

Mediation is serious business. Clients are apprehensive. Attorneys are on high alert. Everybody knows the drill. At the end of the day, someone is going to pay more – or accept less – than they want to. If that doesn't happen, the case doesn't settle and both parties lose. It can be a tense experience.

Sometimes the parties claim the other side is acting in bad faith. If the parties distrust each other, how far will they move? Will they even budge? Nobody's going to change their position when they feel they are being disabused by the other side. Nobody's going to allow themselves to be pushed around. Nobody can afford to let the other side get the upper hand. And as for their unreasonable offer? No way.

What's a mediator to do? If a party won't even hear the other side's offer, a mediation is doomed. Nothing can be done until the parties are at least willing to listen to what the other side is offering.

Parties - and their attorneys - are human. People want to feel valued. They want it known that they have been wronged. They want their thoughts and feelings acknowledged and respected.

When people are angry or upset, they don't think. Instead, they react. They fight. This kind of atmosphere is just exactly what you don't want at mediation. Instead, you want parties and attorneys who are thinking clearly; who will carefully evaluate the risks of pressing forward and who will appreciate the benefits of certainty. You want people who are thoughtful, reasonable, and rational. You want people who are willing to look at things from a different perspective. You want people who are willing to learn and consider. In short, you want people at their best.

The mediator is at the proverbial "eye of the storm." The parties often see the mediator as the person in charge. Sometimes the attorneys look to the mediator for clues or direction. If a mediator is tense, everyone's tense. If the mediator

gets angry, then people get unsettled at best and angry at worst.

Enter the "light touch."

"Nobody sets the tone of a mediation more than the mediator."

If the mediator smiles, people are reassured and at ease. If the mediator is friendly, then people feel comfortable. If the mediator is personable, then the attorneys and parties know they can trust him or her. If the mediator listens – truly listens – to the parties, then they know that their concerns matter. In short, if the mediator is good, the mediation's good. Nobody sets the tone of a mediation more than the mediator.

A well placed quip; a bit of a smile; an expression of personal interest; a compliment. All these help parties feel more comfortable in this inherently difficult environment.

ROBERT B. JACOBS

Mediator • Arbitrator

Tel: (925) 847-8680

bob7@rbjlaw.com

www.rbjlaw.com



Robert B. Jacobs is a mediator and arbitrator with 30 years of litigation experience in business, real estate, and construction cases. He serves as a mediator for the Alameda County Superior Court and is on the mediation panels for the Contra Costa Superior Court and the Bar Association of San Francisco.

And what about food? A hungry person is a poor negotiator. Get some good food in them and the world's a better place. Get something that leaves you feeling good after you've eaten it - and then the parties can focus on the matter at hand instead of how poorly they're feeling. The investment in food can pay big dividends in how people feel about the process - and in their own willingness to give a little.

These are soft considerations - but they're key. A mediation that is staffed with the right decision makers has all the necessary elements for settlement; the only thing that needs to happen is for the parties to make up their minds (or change them) to settle. That very change of mind - and heart - can be helped or hindered by the tone set by the mediator and these other "soft considerations".

Why not give yourself (and the other side) every opportunity to settle? Big guns have their place - but so does the soft touch, the reassuring approach and the personable mediator.

Robert B. Jacobs mediates real estate, business and construction law cases throughout California. Reach him at Bob7@RBJlaw.com.

ROBERT B. JACOBS

Mediator • Arbitrator

Tel: (925) 847-8680

bob7@rbjlaw.com

www.rbjlaw.com