



MAKE THE MOST OF YOUR MEDIATION: THE SINGLE-FAMILY CONSTRUCTION DEFECT CASE

By Hon. Lynn Duryee (Ret.)

How can you economically and effectively settle the single-family construction defect case? In a recent mediation involving a homeowner, contractor and 15 subs, the participants used the following practices, which resulted in 16 signed settlements at the end of one day:

1. Participate in a focused pre-mediation conference call.

All counsel participated in a conference call before setting the mediation. Each spoke knowledgeably about what was needed to prepare the case to optimize resolution. The homeowner needed to do an urgent repair. The contractor needed his expert to finish a report. The subs needed an allocation demand well in advance so that their clients could respond. Some participants expressed a need to speak privately with the mediator. A frank discussion was had about why the case had stalled and what was required to successfully move it forward. It bears mentioning that while the attorneys had experienced a fair amount of frustration in the litigation up to that point, they all bent over backwards to be respectful and friendly in the call. Following the call, a case management order was prepared setting forth all future dates and obligations.

2. Visit the property. Even though the homeowner had permitted a property inspection early in the litigation, she allowed a second inspection so that the neutral could view the property and all participants could take a second look. Her lawyer was thoroughly prepared for the inspection. He created a bulleted list from his expert's report, and he led the parties through the house, pointing out the defects while referencing the list. Helpfully, he had included photos on the list along with expert's estimate for the fix. Seeing the property and remembering it with pictures was critical to having an informed discussion at the mediation. The bulleted list became the basis for settlement discussions.

3. Alert the neutral to obstacles in advance. In private pre-mediation calls, several lawyers identified specific obstacles to settlement: lack of insurance, indignant parties, ridiculous demands, personality clashes and the like. The lawyers gave the neutral suggestions as to how to best handle their issue. For example, one uninsured sub was outraged that he'd been sued, because the owner had repeatedly told him how satisfied she was with his work. Armed with this information, the neutral spoke with the sub in advance, diffusing the emotion and avoiding an emotional and lengthy talk during the mediation day.

4. Have decision-makers present and prepared. Who hasn't experienced the frustration of negotiators working fervently towards a settlement while decision-makers sit at their desks in a remote location and say no every time a new proposal is made? In this case, the participants agreed that decision-makers with full authority would be personally present at the mediation. No telephone standby, no Skype, no warm-body adjusters. It made all the difference in the world to have knowledgeable and thoughtful players exchanging offers and demands.

5. Use all your time to negotiate. While the neutral was juggling discussions with various participants, counsel for the general contractor was actively seeking out deals with some of the smaller players, achieving settlements with several of them. This helped the neutral focus on bigger players and kept the momentum alive. It was encouraging for parties to hear about others reaching one settlement after another. It created a feeling that everyone was working hard toward resolution. Undoubtedly, the clients appreciated their lawyers' intense focus on the case.

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6. Be ready with releases. The lawyers came prepared with releases on their laptops. As subs settled out, releases were signed on the spot, and settling parties were allowed to leave. It is well worth the effort to get the release handled when a settlement is reached and signators are present. This practice saves countless hours and arguments downstream. And what could greater incentivize participants to put their best numbers on the table than the thought of catching an early flight home?

These lawyers proved that construction defect cases need not be protracted, expensive affairs. With a plan, preparation and hard work by everyone, cases can be settled in a single day. And with a little luck, they can be done in time for dinner. ■

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.