Settling Your Case and Maintaining Credibility With Your Client

You're at the end of a full day of mediation and the mediator has delivered the other side's final offer. You recommend it to the client as a reasonable settlement but your client disagrees, saying something like "This is much worse than we talked about just last week. Why should I accept it now? Why shouldn't we go to trial? Why are you changing your mind?" How can you recommend the settlement and maintain credibility with your client? It's time to let the mediator help.

I agree with Jay Welsh, a well-known JAMS mediator, who says that if parties hire a mediator, it's probably because they need to pay more and accept less than they are prepared to do. Otherwise, they'd settle without the assistance of a mediator. So a big part of what I do is help lawyers bring their clients around to the concept of paying more or accepting less to settle a case. Here are some techniques I use, depending on the nature of the case, the sophistication (or anger) of the client, and the experience of the lawyer.

Talk about what the court system can (and can't) do. A client who wants "justice" or "fairness" needs to hear a frank explanation of how the court system will process the case. I explain that the civil court system is only intended to let people resolve disagreements peacefully (without guns or knives), not to find the truth or dispense justice. If a client thinks a judgment in his favor will teach the other side a lesson, I turn the tables and ask: "If you lose at trial, will it make you think you are wrong and the other side is right?" My opinion is that most courtroom losers rationalize the loss by believing they got shafted by the judge/jury/lawyers – not that they did anything wrong.

Explain that everyone learns something new about their case at the mediation. Sometimes there's an "aha" revelation (documents, witnesses, insurance coverage/denial) but more commonly the parties gain a different perspective about the dispute or about the other side. Discussing an offer in the context of what has been learned at the mediation often frees the client to settle or keep negotiating based on new information. Here are some examples:

- there is more than one reasonable way to interpret the facts and apply the law
- one lawyer is better prepared than the other
- a client makes a better/worse impression than anticipated
- the financial condition of a party has deteriorated, affecting the ability to pay a judgment or the ability to continue litigation
- the other side isn't evil and shares the goal of getting out of an expensive lawsuit
- the real difference between the parties' bottom lines is not as large as expected

Discuss empirical litigation risk, not abstract decision trees. Lawyers often talk about risk analysis by multiplying the likelihood of winning (say 66%) times the probable damage (say $300,000), and then throw down an anchor for negotiations ($200,000). Clients like the simplicity and rationality of this analysis ("My lawyer says I'm going to win more often than I'll lose") and it can be hard to pull them away from the anchor number. I find it helpful to remind the client that, even if their lawyer is right about the percentages, the client doesn't get 10 chances – losing 4 of 10 cases means this case could be one of the losers. It also helps to talk about documented examples comparing trial outcomes when a party has rejected a settlement offer.[1] The client's lawyer can agree with me and can get back to discussing the offer.

Sometimes it's necessary for the client to hear it from the mediator – let the mediator help you settle the case and maintain credibility with your client.

[1] A study of 2,000 cases revealed that plaintiffs who chose trial over a settlement did worse 61% of the time, costing them an average of $43,000. Defendants were wrong 24% of the time, at an average cost of $1.1 million. Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations, *Journal of Empirical Legal Studies*, Volume 5, Issue 3, 551–591, September 2008.