

YOUR COUNSEL

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MEDIATION LESSONS LEARNED: 13 YEARS & 250 FEDERAL COURT CASES LATER

I have served as a mediator in hundreds of disputes since 1999. The mandatory mediation program of United States District Court for the Western District of New York ["WDNY"] debuted in the Fall of 2012. During the last 13 years, I have mediated more than 250 cases through the program.

I have learned much from this experience. Here are the lessons that resonate most.

The best mediators and lawyers prepare well. The best lawyers prepare an effective, reasonable, and realistic written submission for the mediator that presents the facts and legal issues in an even-handed manner with concessions where appropriate (*e.g., risks exist, the law is not settled, etc.*). The submission addresses the content in Rule 5.7 (C) of the WDNY ADR Plan and is submitted with enough time for the mediator to review it thoroughly.

The best mediators read the submission carefully and pose appropriate questions to the parties and counsel before and during the mediation.

All mediators and lawyers evaluate liability; fewer realistically consider in advance: (1) the potential damages (*and provide appropriate documentation*); (2) how the plaintiff did or did not mitigate her damages; (3) the defendant's ability to pay and, if applicable, the role that insurance may play in the ability to resolve the dispute; (4) how a judge and jury may perceive the parties and how that may impact the resolution; and (5) terms they "must have" to resolve the dispute.

The best lawyers do not send the mediator pleadings and other documents without explaining how they relate to the case evaluation. They do at times share parts (*or all*) of their submission with their adversary to begin a dialogue on important issues that will arise during mediation (*e.g., alternative calculation of plaintiff's damages*).

The parties know what to expect and are prepared to engage. Parties in successful mediations understand the process and agree on a strategy in advance with their lawyers. They are prepared to speak if they are comfortable doing so. They understand the relevant issues regarding liability, damages, and ability to pay. They are willing to be creative and flexible depending on what develops at the mediation. They are encouraged to share how they feel and are committed to pursuing an achievable outcome.

The best mediators and lawyers listen more and talk less. *“God gave us two ears and one mouth, so that we can listen twice as much as we speak.”*

Mediation is about the parties—not the mediator or the lawyers. Successful mediations occur when mediators and lawyers listen (*patiently and empathetically*) and try to understand the parties’ needs.

All work in good faith and respect the process, the participants, and counsel. Successful mediations begin with a joint session during which all work in good faith. No one attacks the opposing party or counsel. Very difficult disputes have been resolved when the mediator, lawyers, and parties express regret for the dispute and respect the process and each other.

Successful mediations include participants who disagree without being disagreeable. They dispute an opponent’s legal or factual points respectfully and on the merits without demeaning rhetoric, commentary, or name-calling. They do not make threats that discourage compromise.

They do not posture unnecessarily or wait until the eleventh hour to be realistic. Being civil does not supplant or compromise *bona fide* negotiating strategies. They do not offer stratospheric/miniscule negotiating positions that have no chance of success. They “get real” early to create momentum and positive energy that helps resolve the dispute.

They are patient. No one likes to be rushed. It takes time to develop rapport with all involved. Mediations are like fine wine—they often get better with time. The best lawyers and parties do not schedule events on the same day as a mediation. They do not have their faces in their phones, tablets, or smart watches during the mediation. They are present.

The best lawyers ask the mediator for help. Mediators want to resolve disputes. The best lawyers tell the mediator if they are having difficulty with their client or their opponents. The mediator’s independent voice can help. To illustrate, some clients believe that their lawyer will push for a settlement early to earn a quick fee or because they are “afraid” to go to trial. A mediator can assure the client that these are not motivating factors.

The best mediators and lawyers are ready to close the deal at the mediation session. They consider in advance terms and conditions of settlement (*e.g., payment over time, confidentiality, non-disparagement, etc.*). They come to the mediation with a draft settlement agreement. If a more complete written agreement is needed after a mediated settlement, the mediator will confirm the basic terms of the settlement (*in writing or on video*). This reduces the risk of misunderstanding after the mediation ends.

The best mediators, lawyers, and parties do not burn the future settlement bridge if a mediation fails. Although a mediation session may not end in a settlement, it can be a positive experience. This can become part of a longer-term settlement opportunity unless the mediation ends on a sour note. The best participants do not burn the future settlement bridge. It often takes multiple mediation sessions—some months or even years apart—to settle a difficult case.

I appreciate the confidence you have shown by allowing me to work with you and your clients to resolve difficult disputes, including those arising in more than 250 federal court cases. I look forward to continuing to serve you.

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