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## Your Counsel

# Making the most of mediation

More than ever before, we who practice law limit ourselves to a finite number of areas. Notwithstanding, people come to us with many problems which fall outside our expertise.

Although a little knowledge is dangerous, the goal of this column is to share practical information so that you can assist people with employment, disability benefit, workers' compensation and related problems.

In my experience, those problems often are best resolved by the parties themselves and not by a judge or jury. For 20 years, I have served as an impartial mediator in hundreds of disputes (most arise in personal injury, civil rights, breach of contract and employment cases). I also have represented many parties who have participated in mediation during the 32 years that I have been a lawyer.

As a lawyer for a party in mediation, you can make the most of this valuable vehicle for dispute resolution by:

**1. Selecting an effective mediator.** The most effective mediators:

- a. are empathetic, patient and listen well;
- b. are well prepared and ask appropriate questions; and
- c. move the parties toward resolution gently.

**2. Evaluating all aspects of the case.** Liability is critical, however, there is so much more.

- a. Evaluate realistically and in detail the alleged damages (and provide appropriate documentation).
- b. Demonstrate how the plaintiff mitigated damages (e.g., in an employment case where the plaintiff was fired, detail



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her efforts to find new work and offer proof about how much money she earned by working since she was fired);

c. Evaluate defendant's ability to pay and, if applicable, the role that insurance coverage may play in the ability to resolve the dispute.

d. Evaluate other factors, such as how your clients may be perceived by the judge and jury and how that may impact the resolution.

**3. Preparing your client properly.**

- a. Make sure they understand the process and agree on a strategy in advance.
- b. Make sure they understand the relevant issues regarding liability, damages and ability to pay.
- c. Encourage them to be flexible depending on what develops at the mediation.
- d. Recognize that they may be emotional; let them vent to the mediator and/or to the other side if appropriate.

**4. Preparing an effective written submission.**

- a. An effective submission evaluates all aspects of the case as detailed above.
- b. For example, it is not effective to send the mediator all pleadings and medical reports without showing how these documents relate to their case evaluation.
- c. No matter where your case is venued, cover the topics set forth in Rule 5.7 of the ADR Plan (effective as of May 11) of

the U.S. District Court, Western District of New York, found at: <http://www.nywd.uscourts.gov/sites/nywd/files/ADR%20Committee%20--%20Amended%20ADR%20Plan%20Effective%20Date%205-11-2018%20.pdf>

d. Consider sharing with your adversary at least some of your submission to the mediator so as to get your position on various issues "out there" before the mediation (e.g., defense alternative calculation of plaintiff's damages).

**5. Coming to the mediation with a plan but being flexible.**

Mediations often do not go as expected. Be flexible and think creatively about how we can solve the problems affecting the parties.

**6. Respecting all parties and their counsel.**

- a. A mediation that starts with an attack on the opposing party and/or opposing counsel rarely is successful.
- b. In contrast, very difficult cases have been resolved at mediation because the lawyers and clients showed respect and expressed regret for the dispute.

**7. Respecting the mediation process.**

- a. Mediations are like fine wine—they often get better with time.
- b. Patience is important. The parties do not want to feel rushed. It takes time for them to develop rapport with the mediator and their opponents.
- c. Don't schedule other events for the day of mediation. Don't have your face in your

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phone, tablet or smart watch during the mediation.

**8. Asking the mediator for help if needed.**

a. Mediators want to help you settle your case. If you are having difficulty with your client or your opponents, tell the mediator.

b. The mediator's independent voice can help. To illustrate, some clients believe that their lawyer is pushing for a settlement ear-

ly to earn a quick fee or because they are "afraid" to go to trial. A mediator can assure the client that these are not the motivating factors.

**9. Preparing to finish the deal at the mediation.**

a. Think about in advance the terms and conditions that are needed to settle your client's case (e.g., payment over time, confidentiality, non-disparagement, etc.).

b. Come to the mediation with a draft settlement agreement.

c. Even when a more complete written agreement is needed after a mediated settlement, the mediator should commit the basic terms of settlement to a writing that is signed by all participants and their counsel. This reduces the potential for misunderstanding after everyone leaves the mediation.

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