

Your Counsel: Take steps to avoid these mediation mistakes



By **STEVEN MODICA**

Lawyers tend to limit their practice to a few areas. Nonetheless, people come to us with myriad problems — many of which fall outside our realm of expertise.

Through this column, I provide practical information to help you assist those who have employment, disability benefit, workers' compensation,

and related problems.

In my experience, the parties are best positioned to resolve their own problems, instead of a judge or jury. For over 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).

The uncertainty of the pandemic has inspired more parties to choose mediation, even when having to do so virtually. I urge you to use this excellent vehicle to see whether you can settle your client's case (or at least narrow the disputed issues).

As a lawyer for a party in mediation (in person or virtually), I urge you to avoid these common mistakes:

Selecting the Wrong Mediator

The most effective mediators:

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

Failing to Evaluate All Aspects of the Case

Liability is critical, but there are many intricacies to consider.

- Evaluate realistically and in detail the alleged damages (and provide appropriate documentation).
- Demonstrate how the plaintiff mitigated damages (e.g., in an employment case where the plaintiff was fired, detail her efforts to find new work and offer proof about how much money she earned by working since she was fired).
- Evaluate the defendant's ability to pay

and, if applicable, the role that insurance coverage may play in the ability to resolve the dispute.

- Evaluate other factors such as how a judge and jury may perceive your client and how that may impact the resolution.

Failing to Prepare Your Client Properly

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

Failing to Prepare an Effective Written Submission

- An effective submission evaluates all aspects of the case as detailed above.
- 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.
- No matter where your case is venued, cover the topics set forth in Rule 5.7 of the ADR Plan (effective 05/11/2018) of the United States District Court, Western District of New York, found on the Court's website.
- Consider sharing some (or all) of your submission to the mediator with your adversary to set forth your position on various issues before the mediation (e.g., the defendant's alternative calculation of the plaintiff's damages).

Failing to have a Mediation Plan and being Inflexible

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

Failing to Respect All Parties and their Counsel

- A mediation that starts with an attack on the opposing party and/or opposing

counsel rarely is successful.

- In contrast, very difficult cases have been resolved at mediation because the lawyers and clients showed respect and expressed regret for the dispute.

Failing to Respect the Mediation Process

- Mediations are like fine wine—they often get better with time.
- 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.
- Do not schedule other events for the day of mediation. Do not have your face in your phone, tablet, or smart watch during the mediation.

Failing to Ask the Mediator for Help

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

Failing to Close the Deal at the Mediation

- Think about in advance the terms and conditions needed to settle your client's case (e.g., payment over time, confidentiality, non-disparagement, etc.).
- Come to the mediation with a draft settlement agreement.
- If a more complete written agreement is needed after a mediated settlement, the mediator should still put the basic terms of the settlement in writing and have it signed by all participants and their counsel. This reduces the potential for misunderstanding after everyone leaves the mediation.

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