

1,000 MEDIATIONS – LESSONS LEARNED

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Introduction. With more than 1,000 mediations between us we thought you might enjoy reading about our lessons and insights learned. We have been good friends for more than 40 years. We refer cases to each other when we have conflicts, and we continue to learn from each other as we always have. We have both been U.S. Magistrate Judges, U.S. District Judges and now mediate and arbitrate state and federal cases in Iowa and beyond. As lawyers and judges, we have both tried hundreds of jury trials in Iowa and many in numerous other jurisdictions. We have a combined 90+ years of legal experience. We continued to be wowed by how many terrific lawyers there are in Iowa that we work with. We find over 95% to be well prepared, collegial, very professional to work with, and advance their clients' interests over their own. We estimate that even after Covid we do about 60% of our cases on Zoom. That reduces costs and we find that in the vast majority of cases Zoom is just as effective. We like Zoom but very much enjoy in-person mediations, too. Here are our collective lessons learned and insights we hope will be helpful to both newer and experienced lawyers.

Selecting a Mediator - What Are You Looking For?

- Do you want an evaluative or a facilitative approach or a mediator who is skilled in both.
- Is subject matter or procedural expertise (e.g. the likelihood of summary judgements or class certification motions granted) important?
- What qualities do you need in a mediator: e.g. empathy and rapport with clients; gravitas or a current or former judge; adaptability to pivot.
- Feel free to ask for the mediator's fees before selecting her/him.

Contacting a Mediator – Information. When contacting a mediator in addition to asking about availability provide the following:

- the name and email addresses of all counsel, whether it is pre-suit (and if so the nature of the dispute and names of the parties) or if in-suit (a copy of the relevant pleadings) so that the mediator may conduct a conflicts check; and are you requesting in-person or on Zoom or hybrid? If in-person, the location.

Mediation Statements – Timing and Contents.

- Try to agree with the other side(s) to exchange your mediation statements. In our experience over 90% of these statements contain nothing that is confidential. If you do have truly confidential information, provide that information separately for the mediator only. This dramatically improves efficiency and increases the odds of a successful mediation.
- We realize you are busy lawyers but try and send the mediation statements early. The mediator you selected is likely busy, too, and needs time to review and analyze the mediation statements.
- Include relevant factual information and legal issues, settlement negotiation history and who should go first in the mediation; strengths and weaknesses are a must; impediments to settlements; summary judgment and trial dates. Send attachments that you want the mediator to review.
- For employment disputes, it is helpful for the mediator to receive the ICRC charge and employer's response and information on plaintiff's job search and mitigation, if a discharge/constructive discharge case. Tell the mediator what the non-monetary concerns are and what the likely settlement terms will be.

Before the Mediation - What Mediators Want Parties to Know.

- The basics of what mediation is like.
- The role of confidentiality.
- How should the clients address a judge or former judge mediator. We prefer that you and your clients use our first names because it helps us develop a rapport with them. But if our job is to deliver the bad news to your client that they have not yet accepted, maybe calling us "Judge" is the way to go.
- How long may it last?
- How is the opponent likely to respond?
- What is the mediator likely to do and not do?
- We certainly like to talk to the clients directly and help put them at ease. That we occasionally during the mediation we meet with the lawyer(s) without clients.
- That mediations that seem unlikely to be resolved early in the afternoon are often successfully resolved in late afternoon.
- What a mediator's number or proposal is.
- Have the parties or a party explored a structured settlement?

- Prepare the parties for the time and delay that will occur if the mediation is unsuccessful, including post-trial motions and appeals.

Before the Mediation - Best Practices for the Lawyers.

- Feel free to contact the mediator prior to the mediation of an *ex- parte* telephone call, Zoom session, or email exchange.
- Work on resolving ancillary issues, e.g. liens. Explore all non-monetary issues with your client, e.g., allocation of back-pay (W-2) and emotional distress (1099), tax indemnification, non-disparagement, confidentiality terms, no rehire/re-application, no admission of liability, dismissal of claims, release of claims.
- If there is a pending offer, discuss with your client, and if on the defense, discuss with the carrier so you can respond quickly near the start of the mediation.
- Look for objectives that can only be obtained in mediation – not in litigation, e.g. confidentiality, non-disparagement, agreed upon allocation of monetary award, letter of recommendation, etc.
- If there are multiple defendants, do the parties want double-blind mediation (where only the mediator knows who is offering what and what the plaintiff is demanding) to minimize the defendants arguing with each other about respective culpability and slowing down or causing the mediation to fail?
- The defense should prepare a proposed release and settlement agreement prior to the mediation to be used at the conclusion of the mediation. In complex cases needing a consent decree requiring court approval, the exchange of a proposed consent decree prior to the mediation can be a great tool to guide the mediation.
- If there are client control issues or unreasonable client expectations, let the mediator know privately before the mediation.

At the Mediation - Best Practices.

- As the mediation begins, make sure the parties understand that it is typical for the process to start slowly.
- Diffuse any perceived “insult” (e.g. very low offers or unreasonably high demands) before they happen.

- The parties need to understand it's not where the mediation starts but where it ends, that's critical.
- It is best if the lawyers can discourage the parties from preselecting an exact number or position and to remain flexible during the mediation. What a party is willing to do at 11:00 a.m. often changes dramatically by 4:00 p.m.
- Make sure the parties understand that their absolute best-case scenario rarely if ever happens in mediation. Also make sure they understand that compromise (not splitting the difference) is essential to mediation. "This is not a place for homerun hitters. Let's hit a double and leave the park satisfied."
- Mediators need to assess the amount of time to be devoted to an exploration of factual and legal strengths and risks with the parties. If the parties candidly recognize and evaluate risks, less time needs to be devoted to this process. Clients who recognize little risk when it is apparent that the risks are great need more time for this part of the process. The ultimate criticism of a mediator is that he/she is a "water carrier" who simply conveys offers and demands with little added value. So, parties who soberly evaluate both the strengths and risks and are willing to discuss these in mediation increase the likelihood of success.
- Let the mediator evaluate the process and decide what parties appear to need at any given time.
- We find that at least 50% of the time the so-called "best and final" offer or demand is not actually either. Be cautious and careful when labeling a demand or offer "best and final." We have techniques to test the "best and final assertion."

Summary

Iowa is blessed with many good mediators. Find one based on the qualities you want for your particular mediation. Be thoughtful in your mediation statements and try to avoid too much puffery and bluster in describing claims and defenses. Be sure and include strengths and weaknesses in your mediation statement that you have previously discussed with your clients. Try not to have a firm line in the sand when you start the mediation. Encourage your clients to be willing to reevaluate claims and defenses as the mediation progresses. Remind clients that best case scenarios rarely happen in mediation. Inform clients of the virtues of *promptness, certainty and finality* that only mediation offers..

