

## Secrets of a Successful Mediation

By Judge Elaine Gordon, (ret.)

### BEFORE THE MEDIATION

#### 1. Know Your Case

Assess the strength and the weakness of your case. In large part, mediation is a discussion of risk assessment. Be ready for your opponent's arguments and be ready for questions from the mediator. Get someone to play devil's advocate to better prepare your case.

#### 2. Know Your Opponent

Learn as much as you can about opposing counsel and the decision makers on the other side. Try to learn about their negotiation style. Think about calling your opponent and having a pleasant conversation. It may set the tone for the mediation.

#### 3. Prepare Your Client

Mediation requires a different preparation with your client. You will not only be speaking candidly about the case, you will be assessing your client's tolerance for risk. Advise your client that mediation is informal and you may appear more cordial toward the opposition than expected. Your client should be prepared to tell his or her story to the mediator in a confidential caucus. This provides an emotional release for your client which can lead to good decision making.

#### 4. Determine the Value of Your Case

Talk to others about value, including people who do not normally see things the way you do. Think about arranging a low-cost focus group to talk about value.

#### 5. Have a Strategy

Once you have an idea about value, form a team with your client. Prepare a strategy for the negotiation. Know both your aspirational and bottom line numbers. Prepare to be flexible if you learn something new at the mediation.

#### 6. Bring a Written Agreement

Prepare a document with all the terms you want in your settlement or release. Use it as a check list in the negotiations. Then, when it's time to do a term sheet, perhaps after a very long day, you will have the template prepared so nothing will be left out.

### DURING THE MEDIATION

#### 1. Be Pleasant and Patient.

While this advice sounds simplistic, in the course of the mediation process, your patience will be tested. Resist the temptation to react emotionally. Stay away from unilateral declarations which draw a line in the sand. Remember the rule of reciprocity: Model the behavior you want to receive.

#### 2. Listen Carefully

You and your opponent will be communicating through the mediator. Listen very carefully to the questions, observations and comments from the mediator. The mediator's communications always contain information that will help you in your negotiation.

#### 3. Use the Mediator

The mediator can do more than help you communicate your information and positions. The mediator can help you with a difficult client and can coach you through a tough negotiation. Because the mediator has access to both sides, who better understands the rhythm of the mediation?

#### 4. Authority

Make sure the people in the room have adequate settlement authority or be able to quickly contact someone who does. If there are family members or business associates who will influence the mediation results, it is better to know about them in advance and perhaps include them in the mediation.

#### 5. It Can Be a Long Day

Mediation is a process and each case is different. Mediations, to be successful, take time. Often people are not emotionally ready to settle until very late in the day. Sometimes, a client's style is to negotiate slowly and in small moves. On the day of the mediation, do not make any other plans during the day or evening. You may still be working after hours if there is a path to settlement.



Judge Elaine Gordon (ret.)

#### A note from Judge Gordon

My column this month is inspired by the "Practice Tips" video I recently did for the CBA. This 2-minute video can be seen at [www.gordonadr.com/GordonBlog.html](http://www.gordonadr.com/GordonBlog.html)

The election coverage was so dominating you might have missed the news that my Cubbies won the World Series. Having grown up in the shadow of Wrigley Field, I was finally able to cheer my Cubs to victory and shout "Go Cubs Go!"

As is our custom, Gordon ADR is making its annual donation to the Connecticut Food Bank in honor of all the lawyers and staff we were privileged to serve this year. Please keep in mind those less fortunate as you celebrate the Thanksgiving holiday.



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