

BY JOSEPH P. SPINOLA

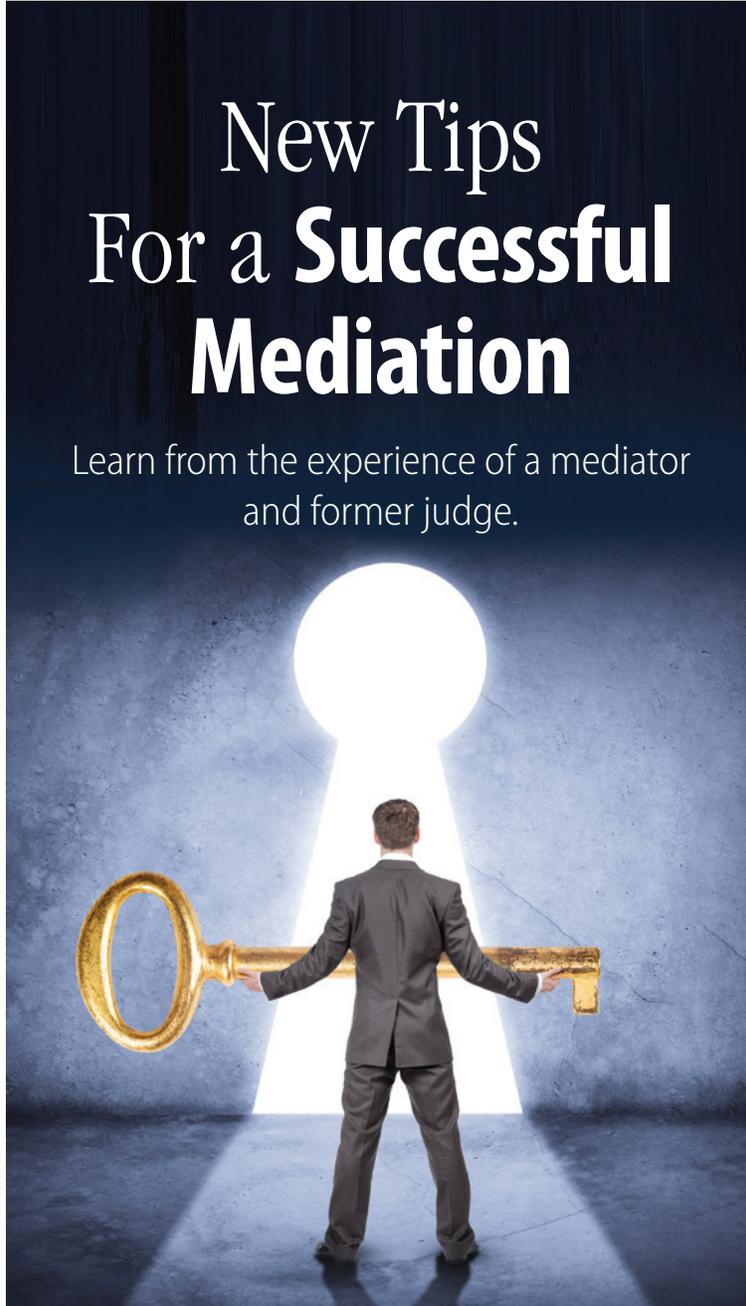
Since retiring as a Justice of the New York State Supreme Court in February, 2010, I have been fortunate enough to develop a full-time mediation practice. As a mediator, I get to work with exceptional trial attorneys and have had the opportunity to mediate over 3,000 cases. Based on these mediations, following are my tips to help increase your success at mediation.

1. Come to the table with a range of possible settlements, not an exact number. You cannot expect to just settle the case for what has already been offered or demanded. You can never expect to settle a case for what you want. Mediation is a fluid process. There must be flexibility during a mediation in order for it to be successful. A good settlement is when both sides have compromised.

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New Tips For a Successful Mediation

Learn from the experience of a mediator and former judge.



2. Always have an idea prior to the mediation of what each side is demanding or offering. I have had experiences where there have been no prior negotiations, meaning the plaintiff has not made a formal

demand and the defendant has not made any offer. Although I can still work with the parties to get the case settled, I find it better when the parties have had prior negotiations. Engage in some negotiations prior to mediating. If possible, always try to get a demand and offer before the mediation. This way you know the parameters (the last formal demand and last formal offer) before you walk into the mediation.

3. Send the mediator a brief Mediation Statement prior to the conference. As a mediator, I always appreciate when an attorney sends me a summary of their case. I mediate a lot of cases where I haven't received information in advance, but receiving a Mediation Statement prior to the mediation allows me to get a basic understanding of the case and saves

time at the mediation conference. A Mediation Statement helps the mediator settle the case.

4. Make sure the opposing side is bringing their client whenever possible. Prior to mediation, make

sure the opposing side is bringing their client. I settle a lot of cases where the plaintiff or adjuster are not there, but it increases the success of mediation if they are present. I find that when the actual plaintiff who is looking for a settlement attends the mediation, there is a much greater chance of reaching settlement than if just the attorney appears. Also, the presentation of the case with the actual client present is usually more persuasive. If possible, try to have the claims adjuster attend the mediation. It helps the adjuster determine whether or not the plaintiff would be favorably or unfavorably received by a jury in that venue. If the adjuster cannot attend, please make sure they are available by video conference or cell phone. Having all decision makers present decreases conference time and increases likelihood of settlement.

5. The venue of the case makes a difference. You cannot expect to settle a case in Nassau County for the same amount as you would in the Bronx or Brooklyn. In addition, the ethnic background of the plaintiff may also make a difference based on venue. The venue makes a difference and you should adjust your offer accordingly.

6. During the mediation, do not get into arguments with your opponent, it does not help. Never make any personal attacks on your adversary, because of the damage that can do. After the joint

session, I always try to keep the participants separated during the mediation. I have had experiences where attorneys have insisted on arguing their case in front of the other party thinking that would help. It has been my experience, however, that it rarely helps. You can't keep trying your case at every round of the mediation. In fact, I usually then spend the next hour trying to calm the parties down in order to reach an agreement.

7. Always make offers and demands so that you have room to move. Most cases will settle if the parties are reasonable and continue to move during the negotiation. As a party to the negotiation, focus on what you can do to make progress toward settlement and not merely react reflexively or negatively to a movement that your opponent has made. If a party does not move to your liking, you can always shorten your increments rather than stop moving altogether. Movement breeds movement. It has been my experience that when each side sees movement by the other side, they are more interested and apt to continue with a difficult mediation. Each small move generates progress and helps the possibility of settlement.

8. Be honest with your mediator. He or she is there to settle the case. Tell the mediator your honest range of settlement and he or she will try to help you get there. If you are honest with the mediator, he or she will have a better idea of where

the case can possibly settle and hopefully will settle for an amount that will make you look good to your clients.

9. Have patience for the mediation process. It is really a process that works. During negotiations, the parties should make movements to encourage the other side to move and create a real chance to settle the case. During the mediation, it never helps to react to another side's proposal with anger, frustration or resignation. The idea is to keep the negotiation going. Most successful mediations occur when the parties hang in there and don't give up on the process.

10. Plaintiff should provide defendant with as much documentary proof of their damages as possible. I have found that when the parties submit documents to each other in advance or at mediation it can help legitimize any settlement. It also helps the claims adjuster obtain the necessary settlement authority.

11. No backward negotiating. Never go backward during mediation. This will almost always result in a failed mediation. Prior to mediating, you should memorialize the last demand as well as the last offer.

12. Structured settlements help. A structured settlement can often help settle a case because the annuity that the insurance company purchases with the settlement proceeds pays the plaintiff

over time and this could be a solution for a plaintiff who is worried about continuing medical care or future medical costs. Structured settlements can also be very effective when they are tailored to the needs of the plaintiff laid out in the life care plan provided.

13. Consider litigation costs. Litigation takes time and costs money. The parties should always consider the cost of litigation. It also takes time and energy to prepare for and conclude a trial, and it usually disrupts one's normal life and opportunity to concentrate on productive activities.

14. It is never a good idea to give your adversary your walk away number. Even if you have a great relationship with the opposing party. Otherwise, it will be converted to a formal offer or demand.

15. If possible, research applicable reported settlements from the Jury Verdict Reporter that are from the same venue, same injury, and same age plaintiff. This allows the negotiations to proceed from a frame of reference.

16. In cases with high exposure and excess coverage, research appellate cases. I think it will serve you well to research similar cases in the appellate division so that you'll be able to negotiate based on what is a sustainable verdict in your case.

17. Make your biggest moves early and smaller moves later. It's important to make a good opening offer at the mediation. It will build

trust with your adversary and set a positive tone for the mediation. Your first move should be the biggest and each subsequent move progressively smaller.

18. Do not make ultimatums. It may seem efficient to cut to the chase, but much theory suggests that you have to leave the other party some room to come back and feel they also have had an opportunity to negotiate. Good negotiation often involves a number of moves before people are satisfied that they have done their best.

19. Never put a time limit on a mediation. Each case must be given the appropriate amount of time necessary to reach a settlement. The process should not be rushed.

20. A great time to mediate a case is when there is a pending summary judgment motion. Both sides may be uncertain about the outcome and more willing to compromise at that time.

21. Determine lien amounts. Prior to the mediation, try to find out the lien amounts as well as the pay-back amount. Liens are a practical problem that we all have to deal with when settling cases.

22. Obtain Medicare information when necessary. Prior to the mediation, obtain the Medicare information if the plaintiff is 62 or older or if he or she is receiving Social Security disability benefits.

23. Harness momentum in mediation. It's important to gain

momentum in the mediation process. Therefore, lawyers should not take too much time (hours) between offers and demands.

24. Each side shares equally in mediation fees. I find it most productive when each side shares equally in the cost of the mediation. Otherwise, the party not paying has no incentive to negotiate fairly. Instead, they will just be there to establish a floor for further negotiations.

25. Dealing with co-defendants. If you know that a co-defendant has no money, they should not attend the mediation because it will only frustrate the process.