

Toner and Connor: Successful mediations: The practitioner's perspective

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Indiana's Alternative Dispute Resolution Rules became effective Jan. 1, 1992. Since then, Indiana attorneys and mediators have helped successfully resolve thousands of disputes. Mediation has proven to be a great tool to resolve cases on agreed-upon terms, in a timely manner, and with substantial savings of time and expense.

In countless articles and seminar presentations, mediators have shared their suggestions to help attorneys better prepare themselves and their clients for successful mediations. In this article, we flip the script to share some practitioners' ideas about what mediators can do to help the parties succeed more often.

1. Preparation: Let us know what you might need: Mediations are more likely to succeed when everyone is well prepared. After reviewing the parties' mediation statements, mediators often have questions about evidence, caselaw, statutes and regulations. Telling the attorneys to bring materials to address likely sticking points helps make sure everyone has access to what they may need to negotiate, and it helps the lawyers more fully prepare to address topics the mediator thinks may be important. Having the right documents in hand can make all the difference to get past sticking points

Mediators can also help attorneys better prepare their clients before mediations begin. Often, a short phone call after reviewing mediation statements can help the parties better separate what they want from what they need and how they can get the most from the mediation session.

2. Participation: Help us keep our decision-makers engaged: Modern technology allows participants to work on nearly anything from nearly anywhere. Sometimes the distractions of other pressing business will interfere with the mediation process. Whenever it becomes obvious that a party is distracted and no longer fully participating, the mediator is in the best position to refocus attention on the process. Often, key decision-makers are insurance company representatives who arrange to attend remotely and who may be tending to multiple negotiations. Thus, it can be awkward for lawyers to insist that their clients or sources of repeat business remain present and engaged. The mediator can more easily tell the client what attorneys too often cannot.

3. Positivity: Help us and our clients believe success is possible: Mediation never succeeds unless the parties want it to succeed. But too often, the scuffles and costs of litigation or some mistaken assumptions about what the other side may be looking for make us too pessimistic about potential solutions. Nearly every mediation starts with discouragement when initial offers are exchanged. Clients respond best when mediators remain hopeful, and most start smiling again when the mediator “buys” lunch for everyone. There are many terrific techniques to inspire participants to explore solutions and continue their discussions. We love it when mediators demonstrate positive thinking and help make sure the discussion does not descend into a spiral of negative sentiment

4. Flexibility: Change is good, so surprise us: Mediations often gain traction and start spinning in the right direction once a mediator employs different personality traits and techniques. Active listening is always essential. Other examples might include sincere empathy, tough love, brutal honesty or the Socratic method. A great mediator will know when patience, flexibility, persistence, stubbornness and other traits are best employed

5. Build trust through impartiality and confidentiality: We find it useful when a mediator reminds everyone about what will be kept confidential throughout the mediation process. We also appreciate it when mediators express an opinion about the pros and cons of sharing mediation statements or whether joint sessions summarizing evidence and defenses are likely to get things off on the right foot.

A mediator may determine that the process would be aided by sharing something with the other side. Trust takes time to build but can be lost instantly when confidence is broken. Mediators who explain the rules to our clients and empower the parties to decide what to share and when to share it will build trust and earn greater cooperation.

6. Approachability: Get to know our clients: We love it when mediators invite decision-makers to share their concerns in confidence. Those exchanges are always friendly, empathetic and respectful. Through active listening, a mediator can help make the parties feel heard and increase the odds of a successful resolution.

7. Process: Useful but not always successful: The right process at the right time usually helps the parties negotiate more easily. Some mediators always split the parties up and communicate only privately. Other times, mediators prefer one or more joint sessions, bracketed bidding, a mediator-recommended number or other techniques. Practitioners also have opinions about these methods and how they might play out given the case and the participants. We welcome opportunities to discuss such options privately and in advance of the mediation session

8. Enforceability: Help us make every deal swiftly become a binding deal: The Indiana Supreme Court has held, “(I)n general, settlement agreements need not be in writing to be enforceable. However, when a settlement agreement is reached in mediation, the mediation rules required that ‘it shall be reduced to writing and signed.’” *Vernon v. Acton*, 732 N.E.2d 805, 809 (Ind. 2000).

Thus, the parties should never leave a successful mediation without a signed memorandum of their agreement. The parties, their attorneys, the mediator and the courts

all have an interest in making the mediated agreement stick without further disputes arising.

Once a successful mediation is reported, courts usually set deadlines for parties to submit their dismissal papers. This moves the settlement process forward and reduces delay. Agreements that specify a deadline for the initial draft of the formal settlement agreement tend to work well, and mediators can help. We find cases are wrapped up more quickly when the mediation agreement contains agreed deadlines to exchange and execute the final settlement agreement and to complete any settlement payments.

9. Persistence: Please check in with us: Cases do not always settle at the first mediation, of course. Sometimes the parties may be more inclined to settle after having a chance to cool down and reassess their case, but even then, it can be awkward for litigators to bring up settlement with clients or opponents. Persistent mediators tend to gain points when they keep trying to facilitate a deal. We find that whenever mediators are tough-minded and not nasty or difficult, but patient, resilient and energetic, success often will follow.

10. Reflection: Ask for some feedback: Car dealers, call centers, doctors' offices, even food delivery services now follow up with customer satisfaction surveys. Are there any reasons mediators should not do the same? Of course, lawyers and clients will be reluctant to be candid until their settlement is completed. But once the ink is dry, the monies have transferred and the case is dismissed, it could be helpful to the lawyers and to the mediator to take a step back and consider what worked well and what could have been better. We welcome more opportunities to work together to find ways to help more mediations succeed. •

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