

SURE-FIRE TIPS FOR (UN)SUCCESSFUL MEDIATION IN THE NH SUPERIOR COURT

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1. When you get the initial Case Structuring Conference Notice and ADR Election Form don't even think about discussing this with your client and opposing counsel. All of this can be worked out much better at the last minute at the courthouse. Everyone works much better under pressure.

2. To save even more time, you and opposing counsel should simply pick a mediator from the list, sign the ADR election form and submit it to the Court without having checked first with the mediator. It is very unlikely that the mediator will have a conflict and is probably highly receptive to taking on another voluntary mediation. Guilt always motivates people who volunteer their time.

3. Send the mediator the shortest possible case summary. You worked hard to condense things particularly before any real substantive discovery so a good terse document bordering on the cryptic is very helpful to the mediator as it will stimulate the mediator's imagination and help him/her visualize all sorts of possibilities and will assist the mediator appreciate the real impediments to resolution.

4. Before the mediation session, don't worry about explaining the process of mediation to your client. He or she is

bound to catch on and appreciate the nuances as things unfold. After all, everyone else there will be experienced in the process. In addition, because you will be there, your client will be relaxed, focused and at ease with the opposing party, the mediator and counsel.

5. Be sure to be unflinchingly resolute and aggressive. Set the tone at the outset that you are not going to be moved from your clearly stated and eloquently pleaded position. You have worked hard to make sure everyone understands that your client's case is as strong as it gets. Your consistency and inflexibility will be an admired and helpful benchmark.

6. Don't get snared in the trap of listening to and perhaps believing any of what the other side has to say. You have already thought things through and it is important to draw a line in the sand and stick to your original position. This is not the time to have any doubts about any part of this case you have worked so hard to advocate. Reflection and reconsideration are clear signs of weakness. You are, above all, an advocate. Hang in there!

7. Some clever well placed ad hominem remarks will really help the other side know that you are a force to be reckoned with and you and your client are just the kind of people judges and juries will respect.

8. When opposing counsel, the opposing party or the mediator is speaking, it's a good time to check your Blackberry

or laptop for messages or to keep turning the pages in your file or to start writing down what you want to say when it's your turn. You know what the other side is going to say and how they are going to say it, and, well, time is money plus your client everyone else there will be impressed that you are such a hard worker and that you can multitask.

9. If the mediator tries to suggest that you and your client might want to consider that others could view something differently, don't be fooled by that type of question - it is just a trick that mediators use and you have worked too hard to wander down a different path plus you are blessed with the gift of getting it right all of the time. After all, you are a lawyer admitted to practice and that was not easy.

10. Do not let your client say anything. It's really unpredictable. It will probably ruin everything. What could he or she possibly contribute? You have been through mediation many times and the decision makers on the other side of the table know all they need to know about how your client will come across at trial and what your client's real needs, wants and problems are. Of paramount importance is that you conveyed all of that eloquently, accurately and completely to all concerned in your letters, e-mails and pleadings. You earned the right to be fully confident that you got all of it and all of it right. You probably even spell checked it.

11. Remember: it is always just about the money. All that

stuff about feelings, hurt, pain, fear, anxiety, and process will all go away with a check. Keep a lid on that stuff. It will just make your client focus on emotions and feelings and getting on with life and then the other side will know that they really have you on the ropes.

12. Be sure to throw around a few war stories. It's critical that everyone in the room knows about the important verdict you got 20 years ago. The circumstances of those cases and the judges and juries are bound to be almost identical and the discussion will remind everyone that you are really in charge.

13. When you and your client are meeting privately, it is important to reinforce with your client that you were just making believe that you would be reasonable but now it is time to send some tough messages with high demands or low offers as that will help get things quickly on the right track.

14. Don't let your client throw you off course. He or she might begin to see the case differently as the mediation process unfolds. Be strong, show some backbone, after all it's your case.

15. Don't worry about the details of memorializing any settlement you worked out. It was a long day. People have worked hard and need to go home. Everyone will remember everything exactly the same way the next morning or the next week. You deserve a break after a hard day's work. Let the

paperwork work slide a little bit. It's really no big deal.

16. At the end of the day, fill out the ADR Evaluation Forms as fast as you can. These forms have no important purpose and the meter maids outside are probably getting rambuncious. The ADR System in New Hampshire is what it is and what possible benefit could come from trying to evaluate the ADR process and the people that serve as mediators? The forms are just filed away someplace.

17. Don't worry about advance preparation for defining or resolving actual or potential liens. After all, those folks are not your client. Workers compensation liens, health insurance liens, long term disability liens, medicare liens, superliens, medicare secondary payor act, etc. etc. are not your problem. You don't represent them - what possible duty could you have to a non-client? Focus on your client's third party recovery and if someone happens to mention this during the mediation session, you have your cell phone and can easily call someone who can make a decision and tie up all the loose ends in just a few minutes. Modern technology is great. Your client will also be impressed with how hard and effectively you can work during the last hour of mediation.