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## Thirteen Steps to Success at Mediation

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**13 Steps to Success at Mediation' offers a number of practical pointers on how to get an agreement, once you are at mediation. Suggestions relating to process such as have food available, don't respond in anger, collect yeses, and one off examples relating to things like late entrants to the mediation, and calling a friend will help the parties reach a settlement.**

I participated in my first mediation in 1991. The mediator kept the parties focused, created an agenda, issues were put on this agenda, and when we were stuck, we moved to something else. At the end of the day, the case settled, the parties were satisfied.

Since that case in 1991, I have participated in close to 2000 mediations, with over 800 as a mediator.

Books like 'Getting To Yes', 'Getting Past No', focused on the dynamics of the negotiation process, communication, exploring positions and interests to find common ground. The matching of interests allowed parties to move past the positional fight. These books also brought in game theory, sociology, and psychology.

'Thinking Fast and Slow' and 'Mistakes were Made', focused on what is going on in the mind of the individual negotiator. What biases and what mind traps existed. Questions like, "what did negotiators struggle with in terms interpretation of facts": "How did cognitive dissonance arise": "How do we account for the perceptions of facts" were explored.

After each mediation I would make notes about the type of case. I found that notwithstanding the type of mediation, there were a number of trends that started to emerge.

1. When you have a dispute that may turn into a conflict, think mediation early. Mediation helps increase the opportunity of early cost effective settlement.
2. We have biases that affect judgements. We then seek evidence that will support how we view the world, (Confirmation bias) we get attached to our cases (Advocacy bias) and outcomes and then devalue what the opposition says (Reactive discounting). We miss opportunities to settle, because our mind is closed to new information.
3. Preparation helps predict success. Mediation is not about making new law rather, finding a precedent. Confirm date, time and place of mediation. This is now easy to do with e mail and texting. Give some thought about food. Well fed negotiators make better more rational decisions. "Low cost high yield" skills like good manners and being on time are important.
4. Mediation is a dynamic process, as long as the parties stay at the mediation, they are making progress. Help move the mediation forward. Seek to collaborate, be prepared to compete. Learn to be versatile.
5. Spend time thinking about where you want to end up. It might take 5 to 8 moves to settle. Set a floor position, and no matter what, don't go below the pre-set floor unless that position is well thought out.

6. Use Opening Statements to get clarity on both the content and process. In many cases having the parties speak helps humanize the process and reinforces that the mediation is really about working with the clients to help them settle the case.

7. Listen to the other side's opening statement, prepare open ended questions. Take notes and notice body language especially from the litigants. This will tell you more of the story. Positions will be communicated and only after questioning, will the interests emerge.

8. Pay attention to the verbal and nonverbal messages coming from the other side. Over half of the communication we send out is nonverbal. The reality the lawyers work with is different from the realities the clients have, and is different from what the mediator may be following.

9. Hold your emotions in check. Acknowledge what is said, and when you feel the emotions rise, take a break. While emotions are running high, the brain can't think rationally. When upset, or in doubt, or if you need time to think, take a break.

10. Try to understand what the other party is saying. Listening for understanding doesn't mean agreement. Find places where you can agree and collect yeses. This will bind the parties to the process.

11. See the resolution of the problem as a common objective, and will help the parties move from listening to understanding to agreement.

12 Neither rush nor delay the closing of the deal. If the matter is concluded have something signed before the parties leave. Memory is fallible

13. Re Occurring Situations:

→Non Parties: Attendees who are not parties, allowed by consent; put some rules in place to make sure the non party is not interfering in the process. In most instances it is helpful to have the non party in the room.

→Experts: In some cases where there is technical evidence being relied on, it can be instructive and helpful for the parties and the Mediator.

→Late Entrants to the Mediation. Almost without exception, these are non parties, and it is a mistake to allow someone in as a late entrant.

→Previous offers: In a mediation where the parties have some prior negotiation, and the briefs don't reflect this, I ask the question "where do we go from here"? Prior bargaining cannot be ignored, especially if the starting position at mediation is now higher than previous offers.

→ Offers to be reflected on: perhaps a party may want to think about an offer overnight, This is usually a good thing to do, allow the offer to be open for a short period of time.

→Calling a friend: Sometimes the Plaintiff will want to talk the offer over with a spouse, parent, or family friend. In my opinion no harm comes from letting a party do this. Again, keep the offer open for a short period of time.

→Split the Difference: After all the science and the art of negotiation, if the parties are still apart, we may see "split the difference". What to split and how large the difference is will depend on the type of case. I caution the parties not to "split the difference to soon" and save it for the last move.

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