

Keys to a Successful Mediation



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THIS ARTICLE ADDRESSES a recent survey conducted by the Alternative Dispute Resolution Committee of the Westchester County Bar Association, in which labor and employment lawyers reported their opinions on mediation of employment disputes. Of the 23 lawyers who participated in the survey, 12 lawyers reported participating in mediation: they all reported their opinion that the mediation process was successful.

The survey did not purport to be scientific or statistically significant, but merely sought the opinions of a group of litigators who attended a CLE entitled “How to Have Successful Mediation of Employment Disputes” in Westchester County. The survey asked participants to assess 12 factors contributing to successful mediations, rating the importance of each on a scale of 1-5, 5 being most significant. (See box.)

Of these factors, the survey revealed that four factors are ranked most important to the success of a mediation, including: (1) the mediator’s process

12 Factors That Contribute to a Successful Mediation

- 1 Timing — pre-litigation
- 2 Timing — during discovery
- 3 Timing — before, during or after motions
- 4 Preparation of the client for negotiations
- 5 Preparation of the mediator regarding the case
- 6 Mediator’s subject matter expertise
- 7 Mediator’s process expertise
- 8 Whether the mediator is paid or unpaid
- 9 Whether the principals of the dispute are in attendance
- 10 Whether there is an insurance company
- 11 Amount of time committed to the mediation session
- 12 How helpful it is for the mediator to be a former judge

expertise; (2) preparing the client for negotiations; (3) the mediator’s preparation regarding the case; and (4) whether the principals attended the mediation.

It was striking that 100 percent of respondents agreed that the mediator’s process expertise is most important to a successful mediation. This finding is similar to a 2011 New York State Bar Association investigation into litigators’ attitudes about mediation conducted by mediator Richard S. Weil in which he found that the “ability of the mediator was the factor that most affected the State Bar respondents’ view of mediation.”¹

Stephen B. Goldberg and Margaret L. Shaw, master mediators who conducted a survey for JAMS, reached a similar assessment. Their survey concluded that the third most frequently cited reason for a mediator’s success was that “the mediator was smart, well-prepared, and/or knew the relevant contract or law.”² The same study revealed that a lack of preparation, including a media-

tor’s weak understanding of the issues were frequently-cited reasons for a mediator’s ineffectiveness.³ Thus, a lesson for those tasked with selecting a mediator is to find someone with both process skills and expertise in the relevant area of law.

In Westchester, 94% of respondents believed that preparing the client for negotiations was very important. A recent American Bar Association article by attorneys Zachary G. Newman and Yoon-Jee Kim confirms this sentiment: recognizing that parties often enter the mediation process “fully prepared to try the case but wholly unprepared to mediate the dispute,” they advocate that “[a]long the way, counsel should have a frank discussion with his or her client about the strengths and weaknesses of the case.”⁴ Similarly, Weil’s State Bar survey found that parties’ realistic expectations was the third most important factor affecting successful mediation, behind the mediator’s skill and preparation and the participants’ good faith and reasonableness.⁵

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Finally, the third most important factor identified in the Westchester study was the attendance and participation of principals to achieving success in mediation. Weil's study found that the presence of persons with full settlement authority was the fourth most important factor affecting success in mediation.⁶

Experienced mediators will endeavor to get the right people at the table in order to negotiate a deal to closing; attorney advocates should think this through when committing to mediation and should be sure that the principal decision-makers and those with settlement authority be present, at the mediation, and not just available by phone. When clients resist attending mediation or send some lower level representative rather than principals,

they risk a wasted effort.

The survey underscores the importance of the selection process, mediator process and substantive expertise, and thoughtful preparation in advance of the mediation — all factors that will contribute to success in mediation.

ENDNOTES

- 1 Richard S. Weil, *Mediation: Through the Eyes of New York Litigators*, at 4, *Report of the Mediation Committee of the New York State Bar Association Dispute Resolution Section and the Alternative Dispute Resolution Committee of the New York City Bar Association*, available at: <http://www.nycbar.org/pdf/report/uploads/20072046-MediationThought-theEyesofNYLitigators.pdf>.
- 2 Stephen B. Goldberg and Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators*, JAMS Dispute Resolu-

tion Alert, Winter 2008, at 3 available at: <http://www.jamsadr.com/files/Uploads/Documents/DRA/DRA-2008-Winter.pdf>.

3 *Id.* at 4.

4 Zachary G. Newman and Yoon-je Kim, *The Increasing Popularity and Utility of Mediation*, ABA Section of Litigation: Corporate Counsel, available at: http://hahnhausen.com/uploads/38/doc/2012_02_zgn_yk_popularity_of_mediation.pdf.

5 Weil, at 12.

6 *Id.*

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