

**Data from Survey of New Hampshire Mediation Training Participants**  
Linked from "[Stone Soup: Takeaways From New Hampshire Mediation Training](#)"  
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Unless otherwise indicated, data reflect percentages of respondents giving response.  
Some totals do not add to 100 due to rounding.

**2. If you have a law degree, how long has it been since you received your degree? (N=87)**

Up to 20 years	23
21-30 years	25
More than 30 years	45
Don't have a law degree	7
Total	100

**3. If you serve as a mediator, how many years have you served as a mediator? (N=84)**

Up to 10 years	24
11-20 years	17
More than 20 years	32
Don't serve as a mediator	27
Total	100

**4. Are you a judge or a retired judge? (N=87)**

Yes	3
No	97
Total	100

**5. Are you on the federal court's mediation panel? (N=87)**

Yes	21
No	79
Total	100

**6. Are you contracted with the State of New Hampshire to conduct mediations? (N=87)**

Yes	31
No	69
Total	100

**7. About how many mediations have you participated in in any role in 2017? (N=87)**

Up to 5	45
6-10	16
11-30	17
More than 30	22
Total	100

**8. About how many mediations have you participated in in any role in your entire career? (N=87)**

Up to 30	20
31-100	28
101-200	22
More than 200	31
Total	101

**9. How much of your practice in 2017 has been in the following roles? (N=86-87)**  
Average percentages

Lawyer representing clients	60
Mediator	26
Other	14
Total	100

**10. In the mediations you attended in 2017, which role have you had most often? (N=87)**

Mediator	46
Lawyer on the plaintiff's side	28
Lawyer on the defendant's side	18
Other	8
Total	100

The mediators in this sample handle some cases involving self-represented litigants in which lawyers do not participate. The types of cases also differed as some mediators handled small claims and family cases in which lawyers do not participate, for example. So comparisons of mediators and lawyers in this data should be interpreted cautiously.

**11. How much of your mediation experience in any role in 2017 has dealt with the following subjects? (N=85-87)**

Average percentages

“Other civil”	21
Family, including juvenile	20
Torts	18
Employment / civil rights	12
Small claims	8
Other	20
Total	99

12. In the mediations you participated in as a mediator in during 2017, indicate the proportion of these cases in which the following actions occurred. If you did not act as a mediator in any cases in 2017, skip this question. (N=61-62)

Actions in Mediation	Less than Half	Half	More than Half	Total
All lawyers (or parties) <b>provided substantive mediation memos</b> before the mediation session?	48	7	46	101
All lawyers (or parties) <b>had a substantial discussion about the mediation with the mediator</b> before the mediation session?	72	11	16	99
There was there a <b>substantial joint session during the mediation with all sides</b> ? This does <b>not</b> include a joint session that covers only the process.	27	4	68	99

13. In the mediations you participated in as a lawyer in during 2017, indicate the proportion of these cases in which the following actions occurred. If you did not act as a lawyer in any cases in 2017, skip this question. (N = 60-61)

Actions in Mediation	Less than Half	Half	More than Half	Total
All lawyers (or parties) <b>provided substantive mediation memos</b> before the mediation session?	28	10	62	100
All lawyers (or parties) <b>had a substantial discussion about the mediation with the mediator</b> before the mediation session?	67	17	17	101
There was there a <b>substantial joint session during the mediation with all sides</b> ? This does <b>not</b> include a joint session that covers only the process.	37	12	52	101

Comparison of results in questions 12 and 13. Percentages of respondents who responded that the actions occurred in more than half of the cases they participated in in 2017.

Actions in Mediation	Participated as Mediator	Participated as Lawyer
All lawyers (or parties) <b>provided substantive mediation memos</b> before the mediation session?	46	62
All lawyers (or parties) <b>had a substantial discussion about the mediation with the mediator</b> before the mediation session?	16	17
There was there a <b>substantial joint session during the mediation with all sides</b> ? This does <b>not</b> include a joint session that covers only the process.	68	52

As noted on page 2, there are differences in the types of cases involving the mediators and lawyers in this sample and some mediators handle cases involving self-represented litigants that lawyers aren't involved in.

**14. In the mediations you participated in as a mediator in 2017, indicate the proportion of cases in which you engaged in each of the following activities. If you did not conduct any mediations in 2017, skip this question. (N=53-54)**

Mediator Activity	Less than Half	Half	More than Half	Total
Spent a substantial amount of time discussing the parties' underlying interests (i.e., not merely saving time and money or settling the case)	20	13	67	100
Suggested possible ways to resolve issues	15	15	70	100
Asked pointed questions that raise issues	11	13	76	100
Gave analysis of case, including strengths and weaknesses	38	17	46	101
Recommended a specific solution for settlement	61	15	24	100
Made predictions about likely court results	70	13	17	100
Applied some pressure to accept a specific solution	79	12	10	101

**15. In the mediations in which you represented a party in 2017, indicate the proportion of cases in which the mediator engaged in each of the following activities. If you did not represent a party in any mediations in 2017, skip this question. (N=57-58)**

Mediator Activity	Less than Half	Half	More than Half	Total
Spent a substantial amount of time discussing the parties' underlying interests (i.e., not merely saving time and money or settling the case)	19	29	52	100
Suggested possible ways to resolve issues	22	12	66	100
Asked pointed questions that raise issues	16	23	61	100
Gave analysis of case, including strengths and weaknesses	29	21	50	100
Recommended a specific solution for settlement	36	14	50	100
Made predictions about likely court results	47	14	40	101
Applied some pressure to accept a specific solution	45	17	38	100

Comparison of results in questions 14 and 15. Percentages of respondents who responded that the mediators engaged in the following activities in more than half of the mediations in 2017.

<b>Mediation Activity</b>	<b>Participated as Mediator (N=61-62)</b>	<b>Participated as Lawyer (N=60-61)</b>
Spent a substantial amount of time discussing the parties' underlying interests (i.e., not merely saving time and money or settling the case)	67	52
Suggested possible ways to resolve issues	70	66
Asked pointed questions that raise issues	76	61
Gave analysis of case, including strengths and weaknesses	46	50
Recommended a specific solution for settlement	24	50
Made predictions about likely court results	17	40
Applied some pressure to accept a specific solution	10	38

As noted on page 2, there are differences in the types of cases involving the mediators and lawyers in this sample and some mediators handle cases involving self-represented litigants that lawyers aren't involved in.

**16. For each of the following activities, indicate the proportion of your cases that you think the activity by the mediator would be helpful (regardless of how often it has happened in your cases in the past). (N=57-59)**

Mediator Activity	Less than Half	Half	More than Half	Total
Spent a substantial amount of time discussing the parties' underlying interests (i.e., not merely saving time and money or settling the case)	12	10	78	100
Suggest possible ways to resolve issues	9	14	78	101
Ask pointed questions that raise issues	5	5	90	100
Give analysis of case, including strengths and weaknesses	21	21	58	100
Recommend a specific solution for settlement	40	29	31	100
Make predictions about likely court results	47	25	28	100
Apply some pressure to accept a specific solution	57	19	24	100

Comparison of data from New Hampshire training and ABA Task Force on Improving Mediation Quality, by respondent's most common role. In the ABA data, the "mediation users" primarily were lawyers. Percentages of respondents responding that they think the **activity by the mediator would be helpful in more than half of their cases** (regardless of how often it has happened in their cases in the past).

Mediator Activity	New Hampshire			ABA	
	Mediator (N=35-37)	Plaintiff Lawyer (N=23)	Defense Lawyer (N=16)	Mediator (N=44-48)	Med. User (N=53-56)
Spent a substantial amount of time discussing the parties' underlying interests (i.e., not merely saving time and money or settling the case)	78	83	81	Not asked	Not asked
Suggest possible ways to resolve issues	70	78	94	79	100
Ask pointed questions that raise issues	83	96	100	87	86
Give analysis of case, including strengths and weaknesses	31	83	75	52	80
Recommend a specific solution for settlement	19	48	63	18	75
Make predictions about likely court results	11	61	44	21	45
Apply some pressure to accept a specific solution	6	52	50	23	64

As noted on page 2, there are differences in the types of cases involving the mediators and lawyers in this sample and some mediators handle cases involving self-represented litigants that lawyers aren't involved in.

Data from New Hampshire training, from questions 14-16, comparing percentages of **reported actual frequency of activities** in mediation in more than half the cases and **activities that respondents say would be helpful** in more than half the cases.

Mediator Activity	Mediator		Lawyer		
	Actual (N=53-54)	Helpful (N=35-37)	Actual (N=57-58)	Helpful - P (N=23)	Helpful - D (N=16)
Spent a substantial amount of time discussing the parties' underlying interests (i.e., not merely saving time and money or settling the case)	67	78	52	83	81
Suggest possible ways to resolve issues	70	70	66	78	94
Ask pointed questions that raise issues	76	83	61	96	100
Give analysis of case, including strengths and weaknesses	46	31	50	83	75
Recommend a specific solution for settlement	24	19	50	48	63
Make predictions about likely court results	17	11	40	61	44
Apply some pressure to accept a specific solution	10	6	38	52	50

Note that there is some difference in the respondents included in the “actual” and “helpful” columns. Responses in the “actual” columns are from respondents describing cases in which they mediated or represented parties in 2017. The “helpful” columns refer to the roles that respondents said that they most often had in mediations in 2017. Even so, there probably is substantial overlap between the “same” groups (i.e., mediators or lawyers) in the “actual” and “helpful” columns.

As noted on page 2, there are differences in the types of cases involving the mediators and lawyers in this sample and some mediators handle cases involving self-represented litigants that lawyers aren’t involved in.

**17. What are some of the most challenging problems you have experienced in mediation in 2017? Include experience as a lawyer or mediator.**

Frequencies are shown in parentheses. Some people included variations of the same issue, which are listed separately. So there may be some double-counting.

The following categories are listed in order of frequency. Within each category, comments are not listed in any particular order.

**Uncooperative Parties and/or Lawyers / Unreasonable Expectations (35)**

The difficulty, at times, in having parties who feel they are "forced" to participate do so.

Lawyers ramping up the rhetoric and contributing to create unreasonable expectations of client(s.)

Getting parties to emphasize [empathize?] with the other side and be willing to compromise when this involves some pain.

A party has unreasonable expectations and attorney does not impose reality check.

A party/attorney uses "last offer" or "take it or leave it" technique.

The usual - stubborn people.

stubbornness.

Parties with no genuine interest in settlement / compromise.

Parties / counsel who give up too easily or are not prepared to persevere in order to settle.

parties using mediation for free discovery.

lawyer inability to control client.

know it all adjustors who did not see potential downside risk to defendants.

Plaintiffs coming to the table but refusing to budge, make a lower offer, etc.

Late but not surprising information that prevents the insurance company from revising their number.

Party comes to mediation and is not serious about settling the case.

Where gap between parties' expectations is unbridgeable.

Lack of good faith by opposing parties in mediation, viewing mediation as a step to the courtroom for trial.

Unreasonable plaintiff demands. Parties not participating in mediations in good faith.

Attorneys don't understand the difference between the Mediation process and the Adversarial methods used in relation to litigation.

Dealing with parties who have been misinformed by their attorneys regarding the merits / likelihood of success of their case.

Attempting to resolve disputes in which a party's "principle" trumps reality and common sense.

Party has unreasonable (or uninformed) expectations of court system.

Dealing with parties who speak in ways that are likely to upset their adversary, thereby creating an atmosphere that is counterproductive to settling the case. Oftentimes the subject matter is irrelevant to the issues in dispute.

attorneys who have set unreasonable expectations for clients.

clients uninvested in the process.

As a mediator, dealing with attorneys who use the mediation session as a discovery tool and attys who don't participate in good faith.

As lawyer, not mediator, always the client expecting a resolution that day, which is a very infrequent result.

Defendant leaving the mediation w/o a single offer.

Defendant putting a very small offer on the table that doesn't entice plaintiff to consider settlement at all.

Unreasonable expectations.

Dealing with party with unrealistic expectations or attorney giving his / her client unrealistic expectations.

Parties with emotional involvement that are too close to the issue to see the weaknesses of their case.

Opposing party willingness to pass a particular number- w/o regard to any fact-based rationale.

Counsel not listening and stuck in position.

Party not prepared to mediate in good faith.

### **Lack of Preparation by Lawyers and/or Parties (14)**

Lack of "emotional" preparation by participants.

Parties who come to mediation without crucial information needed to resolve their disputes even though ordered or reminded to bring the information.

Poor preparation, most typically by plaintiff's counsel not fully explaining the process to their clients.

That the parties aren't ready for mediation. The parties have to be ready to come to the table. If they aren't, no matter what is discussed, mediation won't be productive.

Plaintiff parties represented by counsel not having a detailed timeline of lost wages, interim earnings, re-employment.

Parties not sending in proposals ahead of mediation.

Neither party checking with NH DES about an unemployment lien amount and doing preliminary calculations with the office of General Counsel.

When the other side does not provide documentation required by court rules. It becomes a waste of time and a waste of client's money.

Unprepared attorneys.

Unprepared parties- no BATNA analysis in mediation.

Liens and plaintiff's counsel being unfamiliar with amt. and stats of liens, particularly super liens such as "CMS"/ fed liens.

Failure of preparations / lack of discovery.

Court cases are extremely limited. Parties usually require a great deal of explanation about the process and usually come unprepared. I spend the first hour of court mediations just making sure parties understand the process and screening for DV. Represented clients usually make better use of mediation time as they are likely to come with completed Financials, proposals and a good idea of what to expect during mediation.

medical liens that have not been properly negotiated or resolved prior to the mediation.

### **Self-Represented Parties (9)**

Pro se parties...either both are pro se or one side is pro se and somebody is seeking legal advice and they do not realize what they do not know or the legal advice they need and/or are seeking.

The imbalance which can sometimes be presented most often in cases in which one party is unrepresented.

Dealing with unrepresented parties who are unable to comprehend an explanation of evidentiary and other legal impediments involved in their case.

Most challenging is when dealing with a mediation in which only one party has an attorney, and the other is self-represented.

Lack of knowledge of legal impact by pro se parties that do not want or can't afford attorneys.

dealing with pro se parties of limited education.

As a lawyer, dialog with a self-represented party and a non-atty mediator (in NH family court program).

Pro Se parties who are totally unrealistic.

Pro se parties...either both are pro se or one side is pro se and somebody is seeking legal advice and they do not realize what they do not know or the legal advice they need and/or are seeking.

### **Lack of Attendance or Participation by Person with Settlement Authority (7)**

Insurance representatives not being present. (No longer mandatory in NH)

Counsel not bringing authorized representatives with them.

Defense lawyers who are unwilling to allow direct discussions with insurance adjusters.

Not having the insurance company adjuster in the room (as opposed to on the phone) and even worse when they are on the phone having counsel not allowing you to talk with them but keeping them out of the loop and in private conversations with defense counsel only.

final decision maker not present / available.

Insurance adjusters with authority not appearing at mediations or other persons of authority.

Lack of participation by adjuster; lack of authority by adjuster at mediation.

### **Mediator Passivity / Lack of Creativity / Giving Up Too Soon (6)**

Sometimes as a lawyer, I experience mediator weakness where strength would be helpful. Often it works to have a mediator who is completely neutral and just a facilitator, but sometimes I wish I could somehow tell the mediators to be more assertive and push a little harder.

Mediator that does not try hard enough and accepts "final number" as the end when creative efforts could keep matters moving.

Mediators should be more aggressive in suggesting solutions

Not having a mediator who was interested in seeking a solution to the problem at hand. This problem is typically seen with court-appointed mediators who have a limited amount of time.

The mediator stops trying to mediate a solution when it appears one side is entrenched.

Mediator not pushing hard enough for my client.

### **Problematic Mediator Expression of Opinion (4)**

A mediator gives unsolicited opinion on issues, either legal issues, or likely court result which are not consistent with my view or advice to my client. Mediators need to ask permission to do this or do it outside the earshot of the client.

As a lawyer, a mediator who "predicts" how much a case will settle for in the beginning, then guides the parties towards that figure.

Dealing with an evaluative mediator.

Non-lawyer mediators in New Hampshire's Circuit Courts (small claims and district courts) who rely on costs of defense as stick against defendants without also pointing out to pro se litigants that their lack of understanding of legal concepts and principles results in risk for plaintiffs.

### **Scheduling (4)**

Rescheduling and cancellation requests.

Scheduling.

Mediation scheduled before necessary discovery complete.

Parties participating before case ripe.

### **No-Shows (2)**

One party not showing up.

NO SHOWS.

### **Power Imbalance (2)**

One party appears much more vulnerable to a "bad" settlement than the other.

Power differential.

### **Other**

Client perceives mediator to favor other side or mediator loses credibility with client.

Finding ways to get the parties (as opposed to the lawyers) talking to each other. Most of my mediations involve commercial issues that may have significant dollar exposure and practical business issues intermixed. Getting parties to buy into the fact that dollars may not be the right focus of the negotiations.

In two-small business related-mediations, the participation of a spouse or family member of the opposing party, who earned a J.D., but never practiced law, trying to, unsuccessfully, represent the opposing party.

division of assets, alimony.

Hate between divorcing spouses and former domestic partners.

settlement cases with fee-shifting where the attorneys fees pose formidable obstacle to reasonable settlement.

client understanding.

Parties with mental health issues that make it difficult to focus on the mediation issues and/ or reach resolution (with or without legal representation).

Explaining to one party why the other will not be in the same room with them.

Slowing mediations down when client "Just want it Over."

financial issues.

Breaking perceived impasse.

Overcoming Client resistance.

economic/ financial challenges - not in a position to bring anything to the table.

Reluctant clients who have to travel great distances to attend conferences and mediation in NH.

[As a] Mediator- highly needy clients with opiate issues.

The difficulty, at times, in having parties who feel they are "forced" to participate do so.

Mediator not being prepared or knowing key facts or legal issues in the case.

Nothing unusual.

Too little experience to answer.

**18. What topics would you like to be covered in the trainings on November 2 and/or 3?**

Frequencies are shown in parentheses. Some responses could be included in several categories.

The following categories are listed in order of frequency. Within each category, comments are not listed in any particular order.

**Dealing with Difficult Situations (17)**

Dealing with possible impasse.

How to mediate 'line in the sand' issues.

How to address impasse.

mechanics of how to negotiate (representing a defendant) with little range,

Overcoming road blocks.

I'd like to cover what to do if you get to impasse.

How to move beyond impasse.

strategies to cause a defendant to actually make their top offer during the mediation.

How to engage all parties to seek a common solution.

Helping opposing parties / counsel keep their cool.

Helping clients to keep their cool.

How to address parties who come to mediation with a mindset of making no compromises.

How to approach difficult personalities in mediations.

How to deal with attorneys that are only geared up for litigation, hinder the mediation process and ultimately do not serve their clients well.

What should the mediator do if the mediator believes one party wants to settle on reasonable terms and the other does not?

I am concerned that in mediation it is assumed that everyone should give up something and that everyone's position has merit. However, in the real world, we

have people who abuse and exploit other people. I worry that mediation rewards the person who is dishonest or takes extreme and unreasonable positions by then pressuring the other party into some perceived middle ground that is in fact unjust.

How to address parties and counsel who believe they have iron clad case and only participating in mediation because of a requirement set by the court.

### **Mediator Expression of Opinion / Promoting of Agreement (9)**

The pros and cons of evaluative vs. facilitative mediation.

Never give up. How to ask for permission to evaluate. How to ask permission to put pressure on party.

Facilitative vs. evaluative.

how do keep a balance between being neutral and giving legal advice.

The line between acceptable pressure to settle by the mediator and undermining a party's right to self-determination.

I'm hoping to get some instruction at this training on how to work with the mediator to push harder for settlement in cases where that is appropriate.

What you have planned sounds great! I wold add that many people and attorneys in mediation make too many assumptions about what the clients do or do not want to focus on. how do we balance between pushing resolution to close case and assisting parties to meet their most important interests?

Better understand the objective and subjective processes mediators use to evaluate cases.

when do you ram a settlement down someone's throat?

### **Preparing for Mediation (5)**

How to prepare for mediation as mediator and as attorney.

the use of pre-mediation consultations with counsel.

Parties not checking in advance about NH DES unemployment liens

How to prepare a client for a mediation result that may not be fulfilling but in their best interests.

effective mediation position statements - length?

## **Ethics (3)**

ethics and domestic violence [not sure if interested in ethics specifically in DV cases or ethics generally and DV generally]

Ethical challenges.

how to deal with a mediator who is being one sided?

## **Self-Represented Parties (2)**

Addressing the situation where one party is represented by counsel and another is pro se.

Mediating where one party is not represented by counsel and the other is.

## **Other**

I trust your judgement. Harry Truman was from Missouri. [This gets the prize for the best response.]

Research about mediation styles and skills.

Get a better sense of what works well for mediators in resolving disputes.

Creative mediation solutions outside of a dollar figure.

How to be candid with the mediator without disadvantaging the client.

How attorneys can engage with the mediator to appropriately assist parties in making choices.

strategies and tools for more effective ADR sessions.

Client Management and expectations of mediation.

Opening presentations.

ways to maximize defenses without giving the other party time / opportunity to fix the weakness before trial (or summary judgment).

Handling of multi-party mediations.

Need for mediation agreements.

Guided choice and similar techniques in complex cases.

Alimony, business debt.

Streamlining the beginning process (see above).

How to effectively screen for capacity issues (Domestic violence, mental health, drug addiction, etc.) prior to the start of mediation.

Professionalism.

opening position statements- yes or no?

client representative by phone- yes or no?