

**State Court Training**  
**Mediation: Beyond the Basics**  
**John Lande and Susan M. Yates**  
**November 3, 2017**

Linked from "[Stone Soup: Takeaways From New Hampshire Mediation Training](#)"

### **Mediations from Hell**

- Problems with e-filing, especially for people from lower-income backgrounds
- Receiving memos / communication from one side and not the other
  - o What are the implications about impartiality?
- How do you deal with memos that come the night before mediation that starts the next morning?
  - o "I'm sure you were busy, and you likely know that it is hard for me to have read it before the mediation."
  - o Read the first sentence or paragraph of each section, ask the attorney what you might be missing.
  - o In advance, send out email to say, "If you want the mediator to read this, send it at least 3 days in advance." Otherwise, you're going to have to educate me. Or, "Should we push this off?"
  - o Talk about yourself: "I will have a hard time reading this in advance because . . ." "So help me out."
- Financial statement, even from lawyers, doesn't arrive seven days in advance, or ever.
- Could we do a CLE with the Bar to help address this problem?
  - o Perhaps do a focus group with attorneys, mediators, court administrators to come up with an interest-based solution about mediation memos.

### **Mediations from Heaven**

- Intractable parties settling.
- People are prepared for various situations, especially the unexpected.

- Feeling detached from “mediator as responsible for settlement.” Also, being detached from whether the parties settle altogether.
- Parties focusing together on what they both need and what their kids need in family cases.
- When an attorney says [to his or her unrealistic client], “The Court will never do that, let’s move off of that.”

## **Dealing with Emotions**

Easier for us to identify the emotion, rather than identifying the underlying force driving the emotion.

What does money really mean in a mediation?

- Represents hard work.
- Implicates background of poverty.
- Feels like losing not to get what you expect.

What do you do if someone cries in mediation?

- Give tissues.
- Ask them if they want privacy.
- Watch your own discomfort and don’t act simply to make yourself more comfortable.

What strategies have you tried, and how did they work?

- “Sometimes it’s hard not to fill silence because it’s awkward, but silence can be the power they need.”
- Acknowledge the emotion.
- Not turn away, so you don’t show embarrassment.
- Assure that they don’t have to be sorry for sharing emotion.
- Use non-verbal communication.
- Set ground rules.

How do you deal when someone to whom it would be important to express the emotion is not there?

- Remain humble.
- It is a challenge when there is distrust. Don't necessarily name it as an emotion, but deal with it in caucus.
- Ask for more information before acknowledging emotion.
- Be thoughtful about how emotions are expressed to the other side.
- Characterize things as how people feel rather than as an actual fact.

### **What, if Anything, Mediators Should Do to Assess What Is a Good Mediation? What Legal Information or Advice from Mediators is Appropriate?**

- Is there an agreement on what a good mediation is? If you ask the parties, they have their own idea. Lawyers have their own idea. I imagine the Court has its own idea. "If we're going to be using words like 'good' or 'better,' I just want to know the context in which we're using those words."
- "If you are under the aegis of the Court, I think as a mediator you have to have some sense of an obligation of a fair outcome. They have to know what they are giving up." How would she feel if she had to pay anything? What if she found out later the case would have been dismissed? "I am not advocating giving advice, or even opening up the door to the slippery slope. But I want to prevent the Court from overseeing a miscarriage of justice."
- How do you know what a fair outcome is if you have two people telling opposite stories? We shouldn't be engaging in judgment about what fairness is.
- Concern about providing legal advice if you give information about a statute of information, for example. "It's important to practice fairness without judgment."
- "No matter which side you take, you have to be careful you are giving correct information."
- "Is it about giving information, or asking about what information they have?"
- "I would hope the process begins at the Court level with a self-represented person that you proceed at your own risk when you move without a lawyer." There are forms that protect mediators around the issue of legal advice.
- "I give a lot of legal information. If I don't give it in my subject area, it is opening the parties up to real legal problems: 1) judge may not approve it; 2) because

agreement is unworkable, they end up back in Court after the divorce. Because the goal is to keep them out of court for the longest possible time.” Before I get into people’s position on issues, I hand out information sheets with sections of the statute on topics as they come up, especially reasons to vary from child support guidelines.

- Much of it is not vetted by a judge, so what they come to is what is what they get at the end of the day. “I don’t try to give legal advice, but when I’m with one of the parties in a caucus, I will say to a party, ‘I don’t think a judge will ever do that.’”
- “Many people are very extreme; they want a judge to run their life. It isn’t part of the court’s work. What we are here to do is resolve disputes.”
- “To me, I like to sleep at night. I’m not going to worry, to tell you the truth, about whether I step over the line between giving advice and naming the setting in which they’re operation. So far, God has been good to me.”

### **What have you done to have people come as prepared as possible, particularly self-represented litigants?**

- “I don’t know how you have [pre-mediation] conversations with the parties if you do not meet them until you walk into the courtroom.”
- Maybe there are things the Court can do to prepare them better.
- Anything the court can do to get us the financial affidavits, e.g., emails of parties, phone numbers of attorneys? If I have it in advance, I would do a lot of pre-work.
- “Pre-mediation conversations are very helpful. Often discovery disputes can get resolved.”
- “We can resolve a lot of things in advance.”
- “Helps make the most of a live session.”

### **What Worked Well in the Mediation Simulation**

- Mediator “stepped out” (was quiet) and let us have our discussion.
- Very positive, reaffirmed opportunity to move through this.
- Asked good questions, then let us talk.
- Engaged the parties in having conversation together.

- Letting us have emotional expression and welcomed it as being positive.
- One challenge: party may have talked to a lawyer or know a lawyer.

### **Challenges Working with Self-Represented Litigants**

- Parties change positions quickly.
- Money is a symbol of other things, and sometimes it is hard to get to that “other thing.”
- I had to get through emotions before getting to the (many) problem-solving opportunities. “I was letting them [the parties] deal with the emotions”
- It seemed there was no way to get to the monetary issues before resolving the interpersonal issues. “We’ll keep going until you’re done saying those things.”
- “Do these people want what I think they need?”
- “How do we deal with emotions and keep track of short time allowed to do mediations?”
  - Set agenda.
  - Ask how people want to use the time.
  - Sometimes you have to spend  $\frac{3}{4}$  of the time on emotions.
  - Emotions can be a position, so you can treat it like a reality check and ask what’s underlying the emotion.
  - “I set the schedule so that if time is running out, time does not become the enemy.”
  - Talk about how the parties have made progress.
- Statements about “this is as far as we’ll go” might have been effectively managed in caucus, where there could be reality testing how much money would be spent on trying the case.
- Keeping my (mediator) mouth shut when parties were talking

Thanks to Heather Scheiwe Kulp, ADR Coordinator, New Hampshire Judicial Branch, for taking these notes during the training.