

On the Couch with Dr. Will – A Mediator's Call for Help

by Devon G. Coughlan, Esq.

Dr. Will:

So, what exactly seems to be the problem?

Mediator:

Well, Doc, it's kinda complicated. I'm a mediator, see? I'm supposed to have unlimited patience. I'm talkin' Buddha-like patience. Sometimes I struggle with that. It often feels like Groundhog Day. "Ridiculous" demand from Plaintiff. "Insulting" response from Defendant. Lots of haphazard negotiating. Sometime I just want to grab each attorney by the lapel and shout "Really? Seriously? And you call this a negotiation? You understand you are giving away money by doing this, right? RIGHT?!"

Sorry about that, Doc. Didn't mean to get carried away. I've only been holding that in for maybe the last hundred mediations.

Dr. Will:

So, what is it exactly that you find so frustrating?

Mediator:

In many cases I feel like I am the host of the new game show "Negotiating Badly." I think many attorneys have done enough mediations that it's easy to get stuck in a rut, and treat every mediation the same way. It's as if there is some unwritten script as to how mediation is supposed to play out. Initiative, creativity, and opportunity get lost in the shuffle.

I may be the impartial neutral, but I used to be the advocate, making the same mistakes I now get to witness. It's not easy watching someone commit mediation hara-kiri. It's like being a witness to a car wreck in slow motion.

Dr. Will:

What is it you want counsel and the parties to do?

Mediator:

How much time have we got?

Dr. Will:

It's a 1,500 word article.

Mediator:

*&#\$. You're not giving me much to work with. The thing is, none of this is rocket science. Most folks know it, I'd just wish they'd do it. Ok, I'll try and stick with some of the biggies.

What's with the insane initial demand? I have no problem with a high demand. You've got to do it. Fine. I understand. I'm talkin' about the 5-10 times claim value initial demand, the \$500,000 above any conceivable insurance coverage limits demand. I mean, who does that? Well, actually, many people do it. That's why I'm laying on your couch.

Could SOMEBODY explain to me the purpose of such a move? It is a clever ploy to make sure the insurance company knows that Plaintiff can't be taken seriously, thereby encouraging the carrier not to show up with enough money to settle? Is there a thought that tubing one's credibility on the front-end of a negotiation is the way to go? Anyone? Anyone? Bueller?

I'm baffled. Maybe they just want to test my Buddha-like patience, as I spend the first three hours of mediation working to get the parties to the point where the negotiation should have started in the first place!

Dr. Will:

Do you need a sedative?

Mediator:

No. I'm fine. Really. Buddha-like patience. Buddha-like patience.

Dr. Will:

Please continue....

Mediator:

And the Defendant! The Defendant does not need to be a hater upon receiving a reasonable initial demand. No, not a demand they like, are pleased with, or might accept. That's never going to happen. So stop pretending to be disappointed or upset when it doesn't happen. Don't give me \$5 in response to a good start from Plaintiff. It's only going to cost you more on the back end. Really. Oh, and do you really want to talk to me about midpoints after the first move? No. You don't. Seriously.

Dr. Will:

Tick Tock, Tick Tock.

Mediator:

I can't believe you're rushing me here, Doc. I'm just gettin' rolling.

Dr. Will:

I get paid by the hour.

Mediator:

You're not the only one! Ok, moving on....

Counsel need to talk to their clients. Really talk with them. Not a "we have mediation tomorrow, be there at 9AM, what's your bottom line?" talk. Prepare them like it's a deposition. Invest the time. The case is probably going to settle, and the client can make a difference in the settlement number in a lot of ways. The clients can also blow the whole thing up, shooting themselves in the foot in the process.

I know I'm the bearer of bad news. I'm the reality therapist. That's fine. It's part of my gig. It gets extra-challenging, though, when the client comes to the process having heard only sweetness and light from their counsel. Helpful hint: It's a good thing if the client has heard that they could actually lose the case for the first time BEFORE THEY ARRIVE AT MEDIATION!

Dr. Will:

You look a little tense. Would it help if I put on a little soothing music?

Mediator:

No thanks. I'm fine. Emotional control, including remaining calm and reasonable while being yelled at and told I don't know what I'm talking about, is part of my skill set.

Dr. Will:

Are we finished?

Mediator:

I only wish I were finished! You may wish that as well. Too bad. There's more.

Share! I know. We're lawyers. We don't always play well with others. We're not great at sharing, particularly when it comes to documents, information, or our theory of the case. But here's the thing: Assuming you want the other party to pay more / accept less in settlement, how exactly do you propose to do that? Don't you need to emphasize the strengths of your position, including the facts and law which are in your favor, well before mediation? Let me help: YES YOU DO!

How can you manage the other parties' expectations without engaging them prior to mediation and showing them what your cards look like? Rarely is there a true secret or smoking gun in litigation. The other party is not going to budge as much as you would like unless you give a reason to do so. No one makes massive changes to their case analysis or valuation at mediation. Folks generally are not structurally or psychologically capable of doing so. No gotchas. No surprises at mediation. They are counter-productive, and will only negatively impact your settlement result.



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Dr. Will:

Alrighty, then. Very interesting. That's about all the time we have....

Mediator:

Wait! Wait! I'm not done! Where's your patience? Just two more minutes!

Dr. Will:

Two minutes. I can't imagine you have any more frustrations or pearls of wisdom left to share....

Mediator:

You really have no idea, do you? Anyway.... Lines in the sand! I hate em'. People use them way too early and too cavalierly. Draw a line in the sand too early, and a good mediator is likely to make a liar out of you. You lay down an ultimatum, and suddenly its got someone's ego attached. It's hard to back off from that, and if you do your credibility takes a hit. Draw a line at \$300,000, and later it turns out \$315,000 settles the case. Is anyone going to blow it up over \$15,000? Ultimatums should be used very carefully.

Get to know your playmates. Don't you think it might be helpful to know something about the people with whom you are going to be negotiating? Who is the decision maker? What's his or her experience, work history, background, litigation history, demeanor, negotiating style? What does the other party really want? Money is always the main issue, but what else? Vindication? An apology? Wouldn't knowing those things make a difference in how you negotiate the case? People overlook the human factor way to often. It's a mistake.

Which brings me to another pet peeve: Why wouldn't you want to do a joint meeting at the beginning of mediation? Don't you want to see who you are dealing with that day? Engage them? Watch them react? Try and figure out where their heads are at? There are always things to be learned in even a very brief joint session.

Finally.... stick with it. Stick with the process until you are absolutely positively sure no deal can be done, and the mediator is sure as well. Most obstacles or mistakes can be overcome if the parties don't terminate the mediation prematurely. You may have to have patience like Buddha ... wait, that's my job.

Dr. Will:

I think we are done here. Goodbye now....

Mediator:

This has been a confidential conversation, hasn't it, Doc? It's not like you would ever publish this anywhere, right? That might prove rather embarrassing....

Devon Coughlan of Conflict Solutions mediates cases throughout Maine and nationwide. Coughlan is a graduate of the Duke University School of Law.