

December 2018

A Mediator's Holiday Wish List (Redux)

I regret to inform you that my wish list for December 2017 did not get filled.

Now that the holiday season is in full swing, you are probably soliciting and reviewing your holiday gift-giving lists. I surveyed mediators and discovered that some of the things on my list are a little unusual. But I am not afraid to ask for what I want. Once again, here is my annual Holiday Wish List.

I wish: Attorneys would call in advance or send me a letter explaining what the case is all about, what the dynamics are between the parties and any other information that will help me understand what is going on. I rarely receive more than one position statement, so I have little information unless I can review the docket and the pleadings hardly tell the story.

I wish: Attorneys would set a time to meet with their clients well in advance of mediation to determine if there are unrealistic expectations and/or settlement control issues, and to discuss the parameters of a deal.

I wish: Judges would order parties to plan for two mediations, not just one, and to set the first mediation relatively early in the life of the dispute. An early mediation has several advantages: the parties have less invested so there are lower sunk costs, a prompt resolution increases client satisfaction, it allows you to learn a lot about the other side's position, and it invariably reveals new information. Court should order early resolution because it improves the public's perception of attorneys as agents of resolution.

Brought to you by
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I wish: Parties would schedule enough time to mediate without time pressures created by arbitrary travel plans.

I wish: Attorneys would confer on the telephone in advance and talk about what a deal might look like if there are non-monetary components, and if there are non-parties who are not necessarily “in” the lawsuit but whose presence may be needed to create a deal.

I wish: Attorneys and their parties would remember that upsetting the other side in an opening session is not conducive to a deal and that, at the end of the day, you have to persuade the other side to go along with you on some level in order to reach resolution. Exchanging barbs and laying sharp pinecones on the path to resolution seems foolish.

I wish: Judges would require and expedite an exchange or discovery of key information in advance of mediation and require the parties to share a reasonable amount of information by encouraging written pre-mediation disclosures to one another for the benefit of the litigants, not merely for the mediator.

I wish: Judges and mediators would stop the custom of accepting “your eyes only” mediation statements and tell the attorneys to send their mediation statement to the other side. Many times, clients do not really understand their own case, much less the other side, and seeing the dispute described in writing through the eyes of the other side is extremely helpful. A premediation letter is your chance to communicate directly with the other side in ways that you cannot in litigation-mode.

I wish: Damage calculations were shared in advance, so mediation is not a revelation of previously unknown information. Surprises are fun at parties but a problem in mediation.

I wish: We would implement changes in our litigation-centric culture to foster more expedient and cost-effective settlements earlier in the life of a dispute. In the absence of judicial fiat, then statutorily adopt broader pre-suit mediation

provisions in a wider array of agreements and relationships.

What can you give your client?

The best present you can give a client is peace and freedom from conflict by resolving the dispute quickly and cost-effectively. Litigation is toxic. Settlements have monetary and intangible benefits, but the latter may not be well appreciated by the public or media. Some clients do not appreciate the non-economic value of resolution. Some only later. Dispute resolution contributes greatly to the quality of life, reduces stress and helps ease the burden on under-funded judicial systems attempting to provide justice with often severely limited resources. Litigators and mediators have a critical duty to make the system work better and getting cases out of the court system sooner in the life of a dispute goes a long way to reducing costs, improving access to the courts and the reputation of attorneys.

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