

ADR Insights: 10 Lessons Learned in 10 Years as a Mediator and Arbitrator

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Ten years ago, I shifted my practice from serving as an advocate (an attorney representing parties) to primarily serving as a neutral (an arbitrator or mediator). Those 10 years went by in the blink of an eye. Now that I have hit double digits as a neutral, I am pausing to reflect on the lessons that I learned over the last 10 years.

Whether as a mediator or an arbitrator, here are my top 10 lessons learned:

- 1. ABCs:** As a neutral, I rely heavily on the ABCs. Not the alphabet, but ABCs as an acronym for analyst, bartender, and chameleon. Like an analyst, I analyze the facts, the law, and sometimes the people. Like a bartender, I listen patiently, I listen early, and I listen often. Like a chameleon, I adapt throughout the process to meet the needs of the moment.
- 2. Patience:** I bring my patience with me to every mediation and arbitration. Dispute resolution is a process, and any process takes time.
- 3. Timing:** Each dispute is unique and finding the right timing varies depending on the parties (client and counsel), the nature of the dispute, the status of the dispute, and myriad other factors. Patience and the ABCs help as I evaluate timing considerations in both mediations and arbitrations.
- 4. Mindset:** A flexible, open, and curious mindset is a critical aspect of dispute resolution. Participants' mindsets often evolve throughout the process. While true in arbitration, it is often starker in mediation as participants' mindsets shift from adversaries and advocacy to conciliation and closure.
- 5. Emotions:** People are people and people have emotions. Regardless of whether the dispute is business, consumer, or deeply personal, it is often driven by emotions. While emotions may not change the facts or the law, emotions often impact the path to resolution.

6. **X-Factor:** Most disputes have an x-factor - meaning the thing that sways the ultimate outcome. The x-factor varies by dispute and sometimes, within a dispute, by party or perspective. Identifying, understanding, and exploring the x-factor is critical to reaching resolution.
7. **Receptivity:** Receptivity refers to being open or receptive to resolution. Receptivity is a critical component of both mediation and arbitration. In mediation, the process is used to help parties move from conflict to resolution. In arbitration, while the resolution may not be consensual, the flexibility of the process and the ready access to a forum for resolution may help parties become receptive to closure.
8. **Candor:** Candor with the neutral aids the process. In arbitration, during the preliminary hearing and scheduling conference, candor about the needs of the case allows me to tailor the schedule and process to fit the unique aspects of that dispute. In mediation, candor from counsel about the undercurrents, dynamics, and barriers to resolution aid in my ability to help the parties find a path to resolution.
9. **Authority:** In mediation, there is no settlement without settlement authority. However, the settlement authority someone comes with to mediation may not be all of the settlement authority they can get. Do not let settlement authority become the barrier to resolution.
10. **Preparation:** As Benjamin Franklin famously said, “by failing to prepare, you are preparing to fail.” I consider preparation to be an integral part of my role as a neutral, so I prepare for every mediation and every arbitration. The parties should too.

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