

WHY NEW YEAR'S RESOLUTIONS AND MEDIATIONS FAIL

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What is your New Year's Resolution? Last January I started this blog and resolved to post at least monthly. I did it (well, except for December, which as a working Mom, is excusable—in fact, I declare that henceforth December is off the table for all deadlines.)

Most lawyers and mediators are super swamped during December. Insurance companies, law firms and others want to close cases before the end of the year—be it for tax purposes, a push from accounting or maybe just to start the year off fresh. The week before Christmas I had four mediations in five days. Wow—that's a lot! Three of the four settled, so these are great results. The cases that settled had parties who were open to compromise, knew the facts of their situation and were serious about settling. But what can we learn from the dispute that did not settle? Let's dig deeper and pull out what went wrong.

In the case that did not settle, both sides were represented by experienced attorneys. The dispute was emotional and involved a long-term relationship between the parties. While the case was not a family law case, it did involve a parent's relationship with a child and a service provider to the child. Contrast this scenario to an auto accident mediation in which the parties do not know each other and, if the case settles, will have no ongoing contact after the mediation. Additionally, no insurance covers these types of claims so if the settlement involves a payment, the defendant is typically writing a check out of its own funds.

The first problem occurred when we set up the mediation. One of the parties requested to participate by telephone. This happens all the time in cases with insurance coverage because the adjuster handles many cases and can manage disputes by telephone. The adjuster is a professional who likely participates in a mediation once or twice or thrice (I always wanted to use thrice in a formal piece of writing!) a week. Although it is preferable for the adjuster to attend in person, participation by telephone can work too. However, the parties in my case were not professional claims adjusters and having this party speak by telephone put us all in a less-than-optimal position. Communication was clunky; we could not read any body language and could not hear clearly at times.

The second problem was not as dramatic, but we did not hold the mediation at a neutral location; we held it at the service provider's local office. If we are near my office in St. Louis, I can host the mediation at my offices at USA&M, a neutral location. However, oftentimes disputes arise in rural parts of the state and the attorneys and parties opt for convenience. I have mediated cases in rural courtrooms, church basements, libraries and school districts. Somewhere close to the parties and with conference rooms available. Location is a subtle factor but many times one party feels uncomfortable mediating in the "enemy's territory." If one side feels fear, they are less willing to compromise. Fear of making a mistake. Fear of giving up too much. Suddenly the status quo seems okay and accepting the status quo squelches any chance of real compromise.