

THIRTY THINGS TO SAY IN MEDIATION – A PRIMER

Model Comments for Mediation Sessions©

With Advisory Commentary by Richard H. Ralston

1. “I’m not going to bid against myself.”

This is a classic. You must lock it into your memory. It must be said at all mediations. There are no exceptions.

2. “They have to get serious.”

This is a close second. Also a classic. Say this when you don’t like the numbers, but don’t say it when things are going well.

3. “This is just a waste of our time.” Or a variation to say to the mediator, “This is going nowhere; we are not going to waste your time.”

Another classic. This should be said when you or your client are bored and getting restless, but not too early in the mediation session. As with all of these comments, timing is everything. The variation actually means nothing to the mediator who is being paid an excessive hourly rate.

4. “They are not being realistic.”

This is another classic. Make sure that it is in your repertoire. A variation to say when you don’t like the numbers.

5. “They are not negotiating in good faith.”

Another variation to say when you don’t like the numbers. You can always throw this in for effect. You can say it even when you are not negotiating in good faith.

6. “We’re only here because the judge said we have to be.”

This demonstrates obstinacy and that you are going to be hard to deal with, both valuable attributes for the impending negotiations. However, this also denigrates the mediator’s self image and may work against you. He believes that you have agreed to mediation because of his great talents and his ability to work “magic.”

7. “We’re not getting anywhere.”

Usually said late in the morning when you don’t like the numbers.

8. “This is not about money; it’s about the principle.”

Normally said before any real money is offered or, if you are a defense lawyer, you don’t agree with the plaintiff’s demand. The principle is always vindicated when the price is right.

9. “My client wants to send a message.”

Again, normally said before any real money is offered. If you are a plaintiff’s lawyer, the only real message is, “We want more money” or “Show me the money.” If you are a defense lawyer, the only real message is, “We don’t want to pay that much money.” There is no message when the price is right.

10. “That’s it, we’re leaving.”

Again, normally said before any real money is offered or the plaintiff’s demand is stratospheric or you are anxious to get back to the office because you have an impending trial in another case for which you are not prepared.

11. “My client just wants what’s rightfully hers [or his].”

Again, normally said before any real money is offered. If you are a defense lawyer, your client believes he “rightfully” should pay nothing. If you are a plaintiff’s lawyer, your client believes she is “rightfully” entitled to a billion dollars regardless of the merits of her case.

12. “That’s the most we’re going to pay.”

This is never true and nobody believes it, but say it anyway for effect.

13. “We have full authority to settle for what this case is really worth.”

Of course, that’s just your opinion. True worth is in the eyes of a particular jury, a trial judge, and an appellate panel after all the dust has settled.

14. “If you tried this case 10 times, how many times would you win.”

To demonstrate confidence, respond, “Every time” or “Nine out of 10” even if you don’t believe it. Never say, “We expect to lose this case” even though you actually believe it. The latter comment simply does not instill confidence in the client.

15. “We don’t think he [or she] [opposing counsel] has any control of his [or her] client.”

Say this when you don’t like the numbers, opposing counsel, or the opposing party. This is intended to denigrate your adversary by implying that he or she is being unreasonable and that you, as the superior lawyer, do have control over your client.

16. “I understand what you’re saying, but I’m going to have trouble selling it to my client.”

Say this when your client has no clue about the risks of the case, but you do, your client is insanely intractable, and you really don't have control of your client. A variation of this comment is "I will lose a client over this." This variant is intended to engender sympathy from the mediator.

17. "We're on different planets."

Again, if you are a plaintiff's lawyer, say this before any real money is offered or, if you are a defense lawyer, when the plaintiff's demand is still stratospheric or, in either case, say it when you just don't like the numbers. Do not say this in early stages of the mediation, but only after at least *two hours* have passed. This is the *two hour* rule.

18. "The insurance company [or my client] is kicking and screaming, but they will offer \$ ----- [fill in the blank]."

Say this only if you are a defense lawyer.

19. "Are we going to break for lunch?"

Say this about 11:30 a.m. when you're getting hungry. Do not say this if the mediation started after 1:00 p.m.

20. "Where's lunch?"

Say this about 12:30 or 1:00 p.m. when no food has arrived and your client is complaining about it. It will endear you to the mediator.

21. "We have to speed this up, my claims representative [or corporate officer] has a 2:00 o'clock flight." [fill in any time after noon].

Say this when you don't like the numbers or you are getting bored or your claims representative really has no intention of settling the case at the mediation or your kid has a soccer game at 4:00 p.m.

22. "It's probably counterproductive to rehash our disagreements on the merits, but [insert full frontal attack on opposing counsel]."

Say this when you don't like the opposing lawyer and want to trash him or her. Say this only in St. Louis. Do not say this in Kansas City.

23. "OK, we'll do it, but only if you pay the mediator's fee."

Do not say this if you are a plaintiff's lawyer if the dollar figure has reached \$1,000,000 or more.

24. "If they want a confidentiality agreement, they're going to have to pay for it."

Do not say this as a defense lawyer. Do not say this as a plaintiff's lawyer if the dollar figure has reached \$1,000,000 or more, unless you are trying to get on the front page of Lawyers' Weekly.

25. "Let's just cut to the chase, quit playing games and make our best offer."

Never say this in mediation. Your "best offer" is always negotiable and this comment demonstrates absolute naivety about the negotiation process.

26. "This is my final offer [or demand]."

This is never true, but say it for effect. There will be another few rounds of negotiations after this is said. The St. Louis variant is, "This is our last, best and final offer." The St. Louis variant has more power in the St. Louis metropolitan area. It does not mean the same thing in Kansas City.

27. "We are confident that the judge will grant summary judgment in this case."

Do not say this if you are defense counsel and the case is pending in any state court in Missouri. It simply erodes your credibility. Do say this if you are defense counsel in an employment discrimination case in any federal court. It enhances your credibility. Do say this if you are defense counsel in most medical malpractice cases in the State of Missouri. You may not get summary judgment, but you will be right 80% of the time about the ultimate outcome.

28. "We are confident that the judge will deny summary judgment."

A variation of Comment 27. Say this if you are a plaintiff's lawyer in a case in any state court of Missouri. Do not say this if you are a plaintiff's lawyer in an employment discrimination case in federal court.

29. "You never know what a jury [or judge] will do."

If you say this, everyone will believe it, but they will act like their case is somehow the exception and that the jury or judge will do something predictable for the first time in the history of American jurisprudence.

30. "That Judge Ralston is sure smart and good-looking."

Often said at mediations but is rarely meant unless it is said by Ralston himself.

Notes on Use

Learn these comments by “Mediation Comment Number,” like the Federal Rules of Evidence. Then, when you are participating in future mediations, you can simply refer to the number rather than actually having to say the comment. For example, say “Mediation Comment 1” when you intend to say, “We’re not going to bid against ourselves.” Like many federal judges with respect to the Federal Rules of Evidence, once these Mediation Comments have been officially adopted, professional mediators will understand what you mean without the necessity of actually repeating the comment itself.

Obviously, additional Comments may be added in the future as they become recognized as classics. For example, “This a good result,” a comment often made by the mediator after a settlement has been reached. What it really means is that everyone at the mediation, with the exception of the mediator, is unhappy with the result.