

Focusing on Alternative Dispute Resolution: A Conversation With Two JAMS Neutrals

Hon. Betty Weinberg Ellerin (Ret.) and Hon. Sherry Klein Heitler (Ret.) served on the bench in New York State for more than 25 years before joining JAMS—Ellerin in 2005 and Heitler in 2021. Both of these accomplished women have handled thousands of cases in multiple areas of the law. Recently, Justice Ellerin and Justice Heitler shared their thoughts on the skills needed to be a successful arbitrator and mediator, the benefits of mediation, where the ADR field is going, what advice they'd give to aspiring mediators and arbitrators and more.

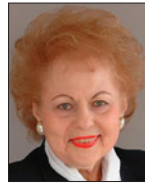
IN YOUR EXPERIENCE, WHAT TRAITS OR SKILLS HAVE YOU FOUND TO BE THE MOST HELPFUL FOR SUCCESSFUL ARBITRATIONS AND MEDIATIONS?

Hon. Betty Weinberg Ellerin (Ret.): Being able to communicate with both the lawyers and the clients they represent. Being fair. You can't have any preconceived notions, and you have to listen with an open mind. Being able to establish some sort of rapport, particularly at the outset, with the lawyers to indicate that you're knowledgeable in the area. Being able to come up with suggestions that might be helpful for moving toward a resolution. But mainly being able to read people. Reading people is critical.

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Hon. Sherry Klein Heitler (Ret.)



Hon. Betty Weinberg Ellerin (Ret.)

Some people come in very hostile; some come in very anxious to settle. A mediator has to be able to pick that up and to address each of those conditions.

Hon. Sherry Klein Heitler (Ret.): I agree with Justice Ellerin. A good mediator has to not just understand verbal communication. They also need to understand body language. Being able to read between the lines is critical. Reading people and responding appropriately is at the heart of a successful mediation. And, like Justice Ellerin said, as a mediator, you really have to be right down the middle. You cannot be judgmental.

WHEN IS THE RIGHT TIME TO CONSIDER MEDIATION?

Justice Heitler: I don't think there's a magic time, but I think a good mediator knows, as does a judge in a case when it is the right time to start mediation. But in general, I'd say as early as possible, if extensive discovery is not necessary.

Justice Ellerin: You have to play it by ear, knowing all the facts in a particular case.

ARE THERE CERTAIN TYPES OF CASES THAT LEND THEMSELVES TO MEDIATION?

Justice Ellerin: I'm an optimist. I think every case can lend itself to mediation. And one of the most powerful aspects of mediation is that you can suggest unorthodox and creative resolutions, which you can't do in a lawsuit.

Justice Heitler: I don't see any type of case that cannot be resolved through mediation. You have an opportunity to be more flexible. You can settle a case by saying, "If A happens, this is the settlement. If B happens, that's the settlement."

WHAT ARE THE BIGGEST BENEFITS OF MEDIATION?

Justice Heitler: Litigation can be very expensive. And mediation allows for quicker and more flexible time frames. Remember, in the court system, cases can take weeks, months or possibly even years. There's also the issue of privacy, or lack of publicity. There are times when, whether the client is a celebrity or a company, they don't want their case to be picked up by the press. Mediation allows for confidentiality, because you're sitting in a conference room and not in an open courtroom.

Justice Ellerin: Most lawsuits have a winner and a loser. But with mediation, the result can be less harsh; neither side comes out feeling aggrieved or oppressed. And, if the mediation is handled correctly,

you do away with many of the proceedings—particularly discovery, which is the area that is most costly. Also, if you resolve a case sooner rather than later, as is often the case with mediation, you eliminate all types of costs associated with court litigation.

WHAT TRENDS ARE YOU SEEING IN THE ADR SPACE?

Justice Heitler: For all the reasons we just mentioned, people want to get things done privately, more quickly and with less cost. So I think we're going to see ADR used more and more. But also, we're dealing with issues that we were not seeing before—things that have to do with spyware and technology.

Justice Ellerin: Over 40 years ago, I was the administrative judge of the City of New York. At that time, a mediation service came in, and they wanted to establish themselves within our court system. But most lawyers rejected it. They said they weren't going to pay for something they could get for free within the court system. But now, the court system itself is utilizing the mediation process. More and more lawyers and clients now recognize that paying for mediation services is a bargain for all the reasons we just stated.

HOW HAS THE LEGAL COMMUNITY ACCLIMATED TO THE USE OF VIRTUAL PROCEEDINGS DUE TO COVID?

Justice Ellerin: I'm not a big technocrat, but I do recognize how useful the technology is. Personally, I like to sit in the room with people and look them in the eye to establish a rapport, but I find that once I drop my subliminal bias, I can do that using technology too. In any case, I think it is clearly the wave of the future.

Justice Heitler: There's a famous line in "Hamilton" that goes, "I want to be in the room where it happens." I think there is always something

very exciting about being in any room with someone, whether you're having a conversation over a cup of coffee or are negotiating a settlement. But it was amazing the way everyone adapted to using the technology, practically overnight. We made it work. And I think as the technology gets better and better, it will be easier and easier.

HOW DO YOU SEE THE FIELD OF ADR EVOLVING IN THE COMING YEARS?

Justice Ellerin: I think ADR is going to continue to expand. And part of that is due to the extraordinary backlogs in our courts. Litigation is a continually growing field in this country, and the system can only stretch so far. ADR provides an alternative. It lets people resolve cases within a reasonable time period, and I think more and more lawyers and clients recognize that.

Justice Heitler: I agree. I also think ADR will expand because of the new areas of law that are evolving. I think individuals in the emerging areas of the law, more and more, are going to want to do private mediations to get things done, especially because some of the newer technology-related issues may take longer to litigate for various reasons.

WHAT ADVICE WOULD YOU GIVE SOMEONE INTERESTED IN PURSUING A CAREER IN ADR?

Justice Heitler: Like anything else in life, mediation is a skill. It wouldn't be too smart for someone to wake up one day and just say, "I want to mediate!" unless they have some experience in the field. Like with anything new, whatever it is—playing tennis or baking a loaf of bread—you really have to learn. Fortunately, there are many programs out there where people can go for training. For example, the court system has run programs on mediating and arbitrating.

Justice Ellerin: The field is increasingly large and very competitive, and the number of mediators is expanding exponentially right now. Lots of judges who have to retire due to their age don't really want to retire, and many of them are gravitating toward mediation and arbitration. So I'd start by asking what the person's status is within the profession and how well known they are.

Hon. Betty Weinberg Ellerin (Ret.) is a JAMS mediator and arbitrator in the JAMS New York Resolution Center. Justice Ellerin retired from the bench in December 2005 after serving as Justice of the Appellate Division, First Department for over 20 years, including a term as presiding justice. She can be reached at bellerin@jamsadr.com.

Hon. Sherry K. Heitler (Ret.) is a JAMS mediator and arbitrator in the JAMS New York Resolution Center. She joined JAMS with 28 years of experience on the bench serving New York State with excellence, including a term as chief of policy and planning for the New York State Unified Court System. She can be reached at sheitler@jamsadr.com.

