



Making Years of Mediation Mistakes: What I've Learned

By Hon. William J. Cahill (Ret.)

After 10 years on the bench conducting settlement conferences, I anticipated that becoming a mediator would be easy. Seventeen years later I am writing an article I could call “How To Do Mediations Wrong.” Mistakes have taught me what I can do better to help counsel and clients increase the likelihood of a successful mediation.

Like all good mediators, I have learned to keep all secrets and forget them the next day. I have found that I need to tell counsel and especially clients the truth of what I perceive to be strengths and weaknesses of a case (I do emphasize different things to different parties). I have learned to listen to all questions, especially from clients, and to answer those questions (or not) depending on the circumstances. I have learned to make sure the mediation gives the clients their “day in court.” If counsel and I do all that then the participants develop trust in the process, so that when it is time to “close,” the clients feel the mediation has been difficult, tiring, and stressful—but fair, so they are open to a resolution that makes them unhappy—but relieved.

Over the years I have been involved in simple, small two-party cases, large, complicated multi-party cases, and everything in between.

One mistake I've made is to look at a “simple” case and think “this will be easy.” I've learned there is no “simple” case. In all mediations, what happens that day is the most important thing that is happening in the client's life. Sometimes it will affect them for the rest of their lives. All cases, big and small, are important, so treat every case seriously and recall that real people are affected by the mediation.

I've also learned that a full exchange of all unpleasant facts, arguments, and relevant personal issues is important; I ask counsel to help me on this. Litigation is already stressful for clients; mediation adds to that stress. The normal social “lubricant” of politeness is suspended. Clients need to hear unpleasant things—sometimes hurtful things. When that reality is handled well, the clients trust the process. But for that to happen, counsel must disclose all facts, good or bad, to the mediator and preferably to each other. That is the only way that lawyers can properly advise their clients what to do, which increases the chances of success. Sometime counsel wants to “keep something secret for the deposition.” I get it, but it interferes with our joint goal of settling the case.

“Surprises”—especially late in the day—severely reduce a client's trust in the mediation process. Examples are a “smoking gun” document dis-

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closed near the end of a mediation, a demand to change a plaintiff's personnel file to show a resignation instead of a termination, a request that a settlement can be paid over time with no security, a request for a client to exercise expired stock options, and a request in an IP case for a future license (especially if it extends to all patents in the plaintiff's portfolio). Last-minute demands for a written apology have blown up settlements. My policy, which I want all counsel to adopt, is: "disclosure of all bad news is great, but surprises are not."

I've also made the mistake of not asking counsel at the start of the day about the "minor details" necessary for settlement. Now I ask the lawyers early in the day to think about what type of release will be requested, will it be mutual, will it include a waiver of unknown claims, or must there be a limited release (e.g. a bank doesn't want to accidentally release an unrelated credit card debt, or a carrier doesn't want this settlement affecting other policies that have been issued). Also, what do we do about releasing certain individuals by name?

I have learned that counsel need to help the mediator know his or her audience. I once started a mediation by reporting that I read the briefs and saw several weaknesses. The lawyers knew what I was doing, but to my regret the clients concluded that I had prejudged the case without hearing from them. Counsel had written a good brief, but I had not let the clients tell me their story orally. I learned that I immediately lost the clients' trust.

I have learned to investigate immediately if I feel something is not going well. There was a mediation where one side got upset and I did not know why. An associate came out of the room and I asked her what was going wrong, promising it would remain confidential between us. She told me that I was leaving the impression that I had taken sides against their client, was not explaining why I thought their case had weaknesses, and was not acknowledging

that they had strengths too. I did not feel that way, so had not realized I had left that impression. I then changed my approach in her room. I have learned not to tell either side "you're not listening;" it's my responsibility to resolve the problem (and to thank that young associate). So if something is going wrong, counsel should just tell me what they are experiencing. Be blunt. Take me out in the hall and have a direct and brutally honest discussion. We mediators grow thick skins.

I have made the mistake of telling one side too much good stuff about their case—"I would rather have your case than theirs." I later learned that when I left the client said, "Wow, the mediator said we have a great case, why are we settling?" I had put counsel in a difficult position of saying that I was too optimistic and the case should actually be settled.

I have made the mistake of not paying enough attention to the carrier who eventually is going to pay to settle the case. They are often the most important person. They deserve respect, just like everyone else, so I often ask them to sit at the head of the table. Claims representatives face a lot of pressure from their companies, their insureds and counsel. They need information and facts to obtain authority. It is my job to make that happen, but counsel can definitely help me keep this in mind.

In cases where a carrier representative is present I make sure I speak to them separately. I need to know if there are any important coverage issues. I can ask the entire room "are there coverage issues?" and be told "no." I later learn that there are coverage issues – the only way to find out is for me to talk to the carrier alone. Sometimes there are attorney objections, but I now insist. That is when I learn about the reservation of rights, the remaining limits, whether it's a "wasting policy" (and how much is left), and other important issues. One way to do mediations wrong is to not have that separate conference with the claims representative. A

mediator must actually hear what is being said (and watch body language), not just listen. The client's job may be at stake, his relationship to his family may be at risk, his personal pride on the line. Such things can make a party reluctant to settle despite the strengths and weaknesses of their lawsuit. Counsel can help by telling me about these issues.

Such issues can become even more important—and hard to spot—in “cross cultural” mediations. Americans negotiate differently than some other nationalities; Americans from different parts of the country negotiate differently; stockbrokers negotiate differently than real estate sales people. A good mediator learns that and adapts to the parties' styles. A Japanese company once brought its CEO and board members from Tokyo. They were quiet, listening, and willing to keep talking when all of the sudden the American East Coast lawyer started arguing like he would in other circumstances, except maybe louder. I could see the Japanese representatives stop listening and close down. The mediation was unsuccessful. Now I head that off at the pass.

I have found over the years that CEOs have no patience for mediation, so I tell them early that they will want to run out before lunch but ask them to stay engaged and trust their lawyers. Sometimes that works, sometimes not and they leave early with a promise to “leave their cell phone on.” It helps if counsel warns the CEO in advance that the pace of mediation is frustratingly slow.

I have given up too early on cases. When I was new and the parties were “too far” apart I would simply say, “You won't settle today.” Counsel should know that in every mediation there will be “impasse,” we just have to work through it. Every day is different (but often everyone feels “too far apart and insulted” so wants to leave before noon). Fortunately, most days by 6 or 7 pm they are signing a settlement. (I think cases settle earlier during the winter because the sun

goes down earlier.) If we don't succeed the first day it helps if counsel stays in touch with me, and tells me what prevented settlement that day.

I have made the mistake of making a Mediator's Proposal too early, so the parties do not trust it. If someone is asking for a proposal, it is usually too early. The proposal is my best estimate of what I think the parties will settle for. In confidential meetings with counsel throughout the day I get a lot of vital information about what might work. I never accept “bottom lines” (and please don't try to fool the mediator, if you want a successful mediation). But if I have been paying attention and especially if counsel has been honest with me, I have some idea as to what might work. I also give the parties enough time to respond thoughtfully. A corporation or carrier may need a few days to evaluate what has happened.

Early mediations are a mixed bag. If we settle, then it saves costs for clients. But nothing is under oath, and attorneys cannot later rely on hearsay information from mediation. It helps to give the other side documents they will get in discovery anyway so that everyone is can go forward early, but informed.

When someone says, “I won't negotiate against myself ” I explain that they are not really negotiating with the other side, they are negotiating against a number they have in mind, probably decided even before the mediation started. You are negotiating against that secret number, so it does not matter what the other side is doing.

And a mistake I quit making years ago is to start the day with a “free for all” joint session where I do not know what is going to happen. When that joint session is over, it takes me two hours to undo the clients' anger and bad feelings. I have joint sessions during the day, sometimes with everyone, sometimes just lawyers, sometimes with just clients without lawyers, but I

only have those sessions if I know what I want to accomplish and I only ask questions that I already know the answer to. If done right, such joint sessions are invaluable.

All counsel and clients expect the mediator to come to their case completely and totally prepared. Mediations are expensive, time consuming, and deserve the very best from the mediator. Over the years I have learned this lesson the hard way; mediation is a job that cannot be faked. (Lawyers can't fake this either.)

And one final way I learned how to do a mediation wrong. Late at night I typed up a mediator's proposal and gave it to the parties. I had

changed my mind as to the number on the first draft and did a second draft. I gave the first draft to one side and the second draft to the other side (they were both still in the printer). Both sides accepted the proposal and went home to prepare the final settlement documents. The next day I had to answer some unpleasant phone calls.

But mediation is a great job and those of us who do it are blessed to have earned the Bar's trust.

Judge Cahill was a litigation partner at Bronson, Bronson & McKinnon. In 1990 he was appointed to the San Francisco Superior Court bench, and since 2000 has been a mediator and arbitrator.