HOW TO CAUSE FAILURE IN MEDIATION

by ALEXANDER S. POLSKY

Much has been written advising of various tips to make mediations work. Let's address ways folks are making sure their mediations fail! Below are some examples.

Mediating too early: Early-stage mediation is a very effective method to minimize risk and control transaction costs. However, for these to succeed, it is necessary for the parties to agree that they will mediate on the information possessed, or to engage in a pre-mediation exchange. Early mediations fail when significant unknown information is brought out, which required further investigation or formal discovery.

Selecting the wrong mediator: It is a simple fact that certain mediations require core interpersonal skills. Death, catastrophic injury, and employment cases require a mediator who is good with people, and possesses empathetic listening skills. A head banger or mediator with an aggressive and evaluative style can kill a deal in emotional cases. Similarly, complex multi-party cases with complicated factual issues require a firm hand that will manage the process *and* understand the issues. So find a mediator trusted by both sides, with the skill sets for the people, process, and issues. Expertise in facilitation trumps subject matter expertise every time!

Not preparing the mediator: Mediators need information, submitted early enough for us to design the most effective process. Not taking the time to have a pre-mediation call, or failing to submit a well-written mediation-oriented brief (more on this later), will leave the mediator guessing regarding the relationship between parties and counsel, the emotions of the case, and other key issues regarding the mediation process.

Similarly, supplying too much material is unhelpful. A pile of exhibits, not referenced in the brief or highlighted for relevance, is just a pile of paper. Tell the mediator what should be reviewed, and append only that which is relevant.

Silly briefs and rude behavior: A silly brief is one that is late, contains typos, and is full of ranting arguments rather than a calculated overview of the risks and issues facing the various parties. It seems lately that the exchange of briefs is being used as a platform for attack in the form of pedantic, aggressive, condescending, and often insulting brief writing.

Often these briefs contain demands or offers that bear no rational relationship to the issues at hand. These do not scare anyone; rather, they have a chilling effect on communication. A recent example was a tragic death case where the brief demanded ten times the "fair settlement value" of the case and insulted the defendants to such a degree that they walked out and flew home—at a time they were prepared to pay an appropriate and fair settlement. One year later, the case settled for about the same amount as would have been produced without all the drama. In other words, failure to approach the process in good faith harms the process.

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Good faith produces a rational brief that acknowledges risks and interests and which is shared, where possible, with the other side. Tell the mediator your warts and suggested mutual interests in a private submission.

Failing to know your opposition: Take the time to learn the quality of opposing counsel. You will gain valuable insight into the most effective communication technique.

Failing to prepare your client for mediation: Where do I begin? Many lawyers seem to avoid sharing a dose of reality with the clients, such that they arrive with unrealistic expectations concerning their case. If it is the plaintiff, the person may feel the process is insulting. If it is the defense, then the decision-maker will not possess sufficient authority. In either case the "re-education" process is placed in the hands of the mediator, which is okay if the mediator is forewarned that the client has expectation issues. In either case, unrealistically high or low expectations should be managed in advance where possible.

Failing to prepare or allowing someone with a separate agenda to influence the client's decisions: Imagine a plaintiff does not speak English. Her bilingual boyfriend attends the mediation, ostensibly to translate. However, he has an agenda, which includes controlling the plaintiff's decisions. He consistently undermines the advice of the counsel and prevents direct communication between the plaintiff and the mediator. The plaintiff has lost the opportunity for a meaningful discussion with the neutral. She has lost the ability to participate in the process, and her pre-conceived notions—and those of her boyfriend—remain obstacles to settlement. The only people attending mediation should be those necessary to advance the process.

Launching personal attacks on the opposing party or counsel: A sure way to derail negotiations is to begin by insulting the other side, in pre-mediation letters, calls, or briefs. Gratuitously insensitive remarks in mediation serve only to inflame emotions. Criticisms may be entirely valid and should be aired, but the manner in which they are raised, as well as the person raising them, is

important. Sometimes the mediator best delivers an unwelcome message.

Opening the negotiation with ridiculous demands and offers: A ridiculously high demand invites an equally ridiculous offer. A reasonable demand met by a low-ball offer discourages a counter-demand. Participants justify these positions by their desire to communicate resolve. There are other, more effective, means of sending that message. The amount of movement in the offer or demand as the mediation unfolds communicates the degree to which a party is committed to a position without derailing the mediation at the outset. A ridiculous offer or demand requires a huge early jump that generally diminishes credibility. Every case has a range; start within it and you are more likely to settle.

AT-A-GLANCE
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Refusing to disclose information that is driving settlement decisions: Early in the life of a case before discovery is complete, one side has key information that it does not want disclosed. Yet it is making decisions based on the secret sauce. Trying to convince the other side, the mediator can only say, "They have evidence that I think will be a real problem for you, but I can't tell you what it is." Attorneys cannot negotiate with a phantom.

Introducing new terms late in the negotiation: Lead with the deal points! In a highly emotional wrongful termination suit, counsel and the mediator have worked hard to keep the emotions under control. The parties are finally getting close to settlement. Suddenly the defendant adds two terms: confidentiality and return of some equipment the plaintiff possesses. The plaintiff announces he is leaving.

The mediator has spent hours building trust in the process to overcome the plaintiff's instinctive distrust of the other side. By introducing new terms, however minor, the defendant has derailed the process. If non-monetary terms are important, get them on the table early in the process.

Asking the mediator what the case is worth: An hour into the mediation, counsel asks what the mediator thinks the case is worth. The answer is irrelevant because no one knows what the case is "worth." Settlement value is a function of what the defendant will ultimately pay and the plaintiff will accept. The mediator, particularly at the beginning of the process, has no way of knowing this figure with any degree of confidence.

The answer is dangerous because it may polarize the parties and prevent settlement. The mediator's number, at least for the side that likes it, will assume the status of truth, seriously complicating further negotiations. A monetary evaluation early in the process may taint the mediator. Neutral evaluations and mediator proposals are a closing technique, made with consent under controlled conditions. They should be requested cautiously.

Failing to overcome biased and unwarranted confidence: The best way to kill a deal occurs where counsel is unable to view the evidence with impartiality. The plaintiff's reality rarely coincides with that of the defendant. More importantly, the parties' realities often have no relation to what a jury may conclude. A lawyer who cannot set aside the adversarial mindset during mediation compounds this problem. People who are unable to look beyond their partisan perceptions get mired in the dispute—rather than the risks. This is often compounded if the lawyers had a genuine lack of respect for one another.

Ultimately, the participants must focus not only on the "facts," but on the relative benefits of a negotiated resolution versus the risks of a trial. They should objectively evaluate the adverse outcome potential, compromise outcome potential, and costs to get there and then, considering all these factors, determine a rational settlement range.

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