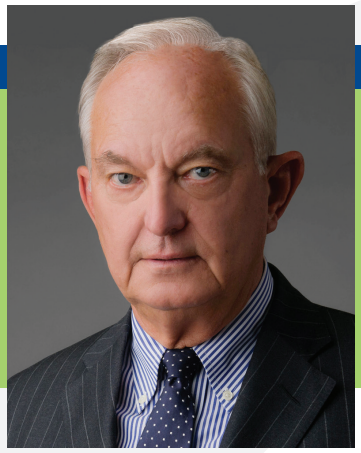

How to Fail at Mediation

By Michael J. Weaver, Esq.

Blowing an opportunity to resolve a dispute is seldom in the client's long-term best interest, but if you want to guarantee you won't leave the room with a settlement, be sure to make several of the following errors. It's guaranteed you'll still be working on the case long after the mediation is concluded.

1. Come to the mediation with unreasonable expectations.

Ultimately, all cases fall within a range of value. Other recent judgments or awards, along with a realistic appraisal of the merits of the case, and how damages are determined provide guidance for the lawyer and the client before they enter the room. If you ignore all of those basics, set a value that might be achieved one time in 10, and then sell your position to your client before the process begins, you may set yourself up for failure. Good luck expecting the mediator to reach closure when an unreasonable position has been adopted and everyone is entrenched before the day begins.

2. Don't prepare.

Presenting your case is as important in mediation as it is in a courtroom. You need to master the facts and the law, and tailor a presentation that demonstrates you are ready to try the case if it doesn't settle. Too often, basic information isn't available. This includes having considered the measure and quantification of damages that will be available. Don't expect to "wing it" and reach closure. Threats of "we'll see you at trial" don't have teeth when you have already shown that you don't know your case.

3. Don't trust the mediator.

Mediation is a negotiation and you need to be mindful of the need to protect your bottom line, at least during the early stages of the mediation process. There comes a point where failing to share what you really want with the mediator creates the real risk that the mediator will misread you and allow a potential settlement to slip away. Mediators won't throw your money away or leave it on the table, but they may believe there is such

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a gap in positions that no settlement can be achieved.

4. Never permit an open session with all of the parties present.

Joint sessions were formally the "rule" and every mediation began with one. Now it is rare indeed that the parties want to begin the day in one another's company. However, joint sessions can have real utility. If you are prepared, you can demonstrate the strength of your case to your adversary's client. In turn, you can see and consider the abilities of your opponent and his or her client. Often you can see why a case has more (or less) value when it has been explained by the other side. It will also allow you to know who is present at the mediation and determine if the real decision maker is there, in good faith, to bring the case to a close. And, if insurance is involved, it helps to let the carrier representative see the plaintiff and his or her counsel.

5. Insist that everything be maintained in confidence.

Keep in mind that persuading the mediator isn't the primary objective of mediation. Mediators have no decision-making authority in a consensual process. Mediators must be armed with the information necessary to convey to your adversary that there are meaningful reasons to resolve the matter. Use of confidential briefs is generally unnecessary. If you have truly confidential information, include it in a supplemental brief. It saves time and permits early focus on the key issues if everyone is working from a common playbook.

6. Don't consider alternative approaches for resolution.

When the facts and issues create alternatives to the simple payment of money, think those options through and share them with the mediator. Is there a way to reduce or bridge the gap between demand and offer that is nonmonetary but of value to your opponent?

7. Don't consider the "end game" and ignore the form of any final settlement agreement.

Your "trial bag" should contain a settlement agreement that you reviewed before the mediation. Ideally you should prepare a draft featuring the terms you need to include in any final documentation. Remember an oral agreement made during a mediation isn't enforceable and often, in the rush to draft an MOU, unprepared lawyers misstate key positions. After the mediation isn't the time to try and renegotiate for items that would have been readily available had they been raised earlier. Reserving issues for later "arbitration" or binding determination by the mediator is fraught with problems and guarantees that at least one party to the settlement won't get what they thought was being offered.

Avoiding these mistakes will make the mediation process more productive and less stressful for all concerned.

Michael J. Weaver is a JAMS neutral based in San Diego. He has four decades of legal experience, including more than 20 years as a mediator and arbitrator. He specializes in resolving complex domestic and international matters across a broad spectrum of practice areas. To learn more, visit his bio at **www.jamsadr.com/weaver**.