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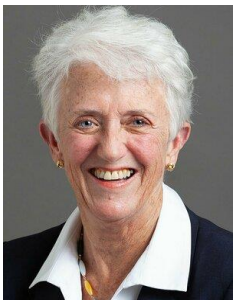
5 Mediation Mistakes That Create Obstacles To Settlement

By **Lynn O'Malley Taylor and Rachel Gupta** (March 31, 2022, 12:14 PM EDT)



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Mediation is often a grueling and exhausting process. The right mediator should be instrumental in helping the parties reach a resolution.

At the same time, however, mediators are not miracle workers. Negotiators often hinder their chances of resolving cases by making mistakes prior to, or during, the mediation. Avoid these five mistakes to maximize the chances of settlement:

1. Anchoring Too High or Too Low

Many lawyers view the first offer or demand as a game of chicken — worrying that if they move first, they are signaling weakness. But if your offer is thoughtful and strategic, there are advantages to being the first to move.

The first offer you make in a negotiation is your anchor. It tells the other side the general range you are targeting for a deal. A common mistake is anchoring too high or too low. For example, a plaintiff may come in with a steep ask that is outside their true range of expectations, or a defendant may enter with an amount that is too low to be considered even nuisance value.

Both of these anchors threaten the success of the mediation and may send the message that you are not interested in engaging or are being completely unrealistic and unreasonable. Setting an inappropriate anchor can also jeopardize your credibility.

Instead of strategically making offers or demands grounded in conviction and objective criteria, when you anchor inappropriately and then make big concessions to move closer to your true target, you make it clear that you have been merely posturing. Instead, anchoring appropriately signals that your counterparty needs to take you and each of your offers seriously.

While your opening ask is never your final ask, it should be within a reasonable range of where you are targeting (after a few moves), and it should not be a universe away from your walkaway — the point where you decide that rolling the dice in litigation is a better alternative. Investing the time before mediation to create a strategy for your anchor and your subsequent moves is invaluable.

2. Failing to Adequately Prepare for the Mediation

Not spending adequate time preparing for the mediation may likely prolong the process and be costly to the clients.

Before mediation, lawyers and clients should do a thorough evaluation of the costs and benefits of the case. Consider the evidentiary record. Evaluate chances of success on dispositive motions and at trial. Review controlling case law. Ponder the counterfactual and legal arguments your adversary is likely to make. And as discussed above, create a strategy to get to your desired outcome.

In addition, lawyers should prepare their client for what to expect. Failing to do so can be disastrous, particularly if the client's expectations are unrealistic. For many clients, mediation will be the first time they will participate directly in settlement negotiations. It is a mistake not to discuss the financial, time and emotional costs of going to trial. Many clients do not recognize or understand the risks and uncertainty involved in trying their case, or consider the benefits of obtaining a mediated settlement with a certain result.

Also, lawyers should try to build a working relationship with opposing counsel prior to the mediation. It is easier to negotiate the resolution of a dispute with someone you know rather than a stranger.

3. Not Accounting for Compounding Risks

In preparing their risk assessment of the case, negotiators often forget to consider compounding risk. In other words, in determining the settlement value of the case, negotiators consider each risk in isolation, not as a whole.

For example, if there are four legal issues that can impact the value of a case, it is important to consider what the value is not just if you win or lose on one of them, but varying outcomes, including losing on all of them.

It is also important to consider how each factor may impact the others and what it may mean for the value of the case in various scenarios. Similarly, you need to consider the compounding effect of procedural risks, such as the risk of losing on summary judgment plus the additional risk of losing at trial.

In weighing compounding risks, you may also need to consider factors such as the timing of trial and how that may impact chances of success on each legal issue.

In other words, what is the risk that there may be negative developments in the case law that impact the value of your case? For example, if there is a pending appeal in a different case that can shape the law a judge or jury will consider in yours, the further away you are from trial, the more likely that appellate decision will be relevant to the valuation of your case. In the wake of COVID-19, many cases are taking longer to get to trial, making timing of trial an important consideration.

Failing to consider the risks in your case collectively and in varying scenarios can lead to an inflated expectation of settlement value and frustrate the negotiations. Alternatively, coming to mediation informed by a comprehensive risk assessment will enable you to meaningfully evaluate any potential deals.

4. Making Premature Ultimatums

Negotiators often bluff; it's part of the game. But when a negotiator routinely cries wolf by issuing ultimatums that they do not stick to, they lose credibility. This presents a problem when later in the negotiations that party views something as a deal breaker and their adversary doesn't believe them. This can quickly lead to frustration and impasse.

The most common premature ultimatum is "best and final." As mediators, we are cautious when we hear this phrase because 9 times out of 10, the party backs down. An offer is your best and final when — and only when — you are unwilling to accept any other number, no matter how immaterial the difference may be. You will walk away unless that is the number that is agreed upon.

Another common bluff is ending the mediation too soon or threatening to do so. Sometimes a deal is not reachable and continuing to negotiate will only serve to create more frustration. If you — and the mediator — believe that there is currently no obtainable deal, then ending the mediation makes sense.

But parties sometimes end the mediation — or threaten to end it — prematurely because they are irritated with their counterparty's last offer. They also sometimes think leaving — or threatening to leave — will scare the other side into submission.

Before taking this step, it is recommended that you take a break, take a breath and continue the mediation after you have had a chance to settle your emotions. If the goal is to reach a deal, it's better not to leave in a fit of anger — or as a scare tactic — and be left asking: what if?

5. Being Overly Litigious

The goal of mediation is to negotiate a deal, and overly aggressive lawyers can hinder that process. One of the biggest and most common obstacles in mediation is when litigators refuse to budge from their courtroom arguments and conduct themselves as though they are presenting their case to a judge or jury. Mediation and litigation are different, and lawyers' roles in each are too.

Overly litigious behavior tends to favor avoiding joint sessions. Joint sessions, however, can be extremely productive if the participants are collaborative. Joint sessions are a prime opportunity to listen actively and acknowledge what is being said.

The least expensive concession you can make to the other side is to let them know that they have been heard. You can express understanding even if you do not agree with what the other side is saying.

A joint session not only gives the parties the opportunity to tell each other that they have come to the mediation in good faith, but it may also aid the principals in exchanging information directly and brainstorming ideas for settlement. The parties and principals can avoid miscommunications that may happen in shuttle diplomacy.

However, joint sessions can be entirely destructive to the mediation process when attorneys are overly litigious.

Similarly, writing a mediation statement in the same manner as a dispositive motion, replete with legal argument, is a mistake. Instead, focus on gating issues that need to be addressed prior to resolution, as well as potential settlement structures and proposals that each party may be willing to explore.

Finally, litigators should let the clients play an active role. Their input and feedback during the negotiations are critical to ensuring that their interests are met and that a negotiated deal is acceptable.

In closing, an experienced mediator can help the parties overcome impasse. In the end, however, the parties control whether they reach an agreement. Mediation participants can avoid adding roadblocks by doing their homework and being thoughtful and strategic in their negotiations, rather than adversarial and argumentative. If the parties want to settle, the worst thing you can do is negotiate in a way that ends the mediation prematurely without knowing whether an acceptable deal is obtainable.

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