# MOVING FROM PREPARATION TO NEGOTIATION – HOW TO CAUSE FAILURE IN MEDIATION – PART 1

*By Alexander S. Polsky, Esq.*

Much has been written advising of various tips to make mediations work. Let's address ways folks are making sure their mediations fail! Here are a few:

**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 requires 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 submitting a well-written mediation oriented brief (more on this later), leaves 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 10 times the "fair settlement value" of the case, insulted the defendants to such a degree that they walked out and flew home – at a point when 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 does not result in a successful mediation.

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

**Failure 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 fine 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.

These are just some ways in which a mediation can be derailed early on. The next installment in this two-part series will outline several more. ■

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