How To Sabotage A Mediation In Nine Easy Steps

By Roman Lifson

How can you avoid the mediation scuttling your plans for true trial vindication? The handy, easy to follow steps below should guide you.

So, you say you will be mediating your case. You have been doggedly preparing it for trial for months. Motions have been argued (and largely denied), depositions have been taken (and self-serving *errata* sheets exchanged), and expert witnesses have been designated (and opposing experts saying – shockingly – the exact opposite have been disclosed). The long-awaited trial date finally is approaching. You have cleared your calendar, arranged for witnesses to be available, created compelling demonstrative exhibits, and are well on your way to devising cross-examination outlines sure to reveal the dearth of your opponent's case. But now there's this mediation thing that has arisen, bringing with it the risk that instead of bringing the case to the climax of a stirring victory after a jury verdict in your client's favor, the case will peter out in a flourish of settlement documents, not a closing argument irresistible in its logic and persuasion. So how can you avoid the mediation scuttling your plans for true trial vindication? The handy, easy to follow steps below should guide you past this potential quagmire and set you on the final stretch to the courthouse doors. *

**At the risk of stating the obvious, the author's tongue is planted firmly in cheek, and the reader is reminded of the panoply of ethical rules that would require him or her to avoid, rather than embrace, these handy, easy to follow steps.*

1. Make Sure Your Client Has Unrealistic Expectations.

Your client hired you to vindicate its position, maybe even to vindicate a principle. The client has paid your bills, spent hours unearthing documents in response to the opponent's onerous requests for production, endured a long deposition full of loaded questions emerging mostly unscathed due to able preparation, and has patiently waited for the wheels of justice to finally grind toward a victorious conclusion. Why should settlement be any different? With the client's approval, you have exchanged pre-mediation demands and offers. Now, in preparation for the mediation itself, what better way to sabotage the prospects for settlement than for the client to stake out an absolutist bottom line before the process even starts? "I will not take any less than X" or "I will not pay any more than Y" is easy to understand and to follow. No sense listening to the opponent, no need giving the mediator the opportunity to get both sides to deviate from their preconceived moorings. After all, there is nothing to be learned from listening to the other side. No reason to reevaluate how his case themes may resonate with a jury, how he may come across to seven people who know nothing about your case, how a judge may rule on thorny evidentiary issues left unresolved by motions in *limine*. To make the settlement chances plummet, encourage the client to establish a clear and unwavering bottom line before she has the benefit of the mediation process. With that bottom line established, it will be much harder for the opponent, the mediator, or you, to convince the client to question her preconceived notions, to distance herself from the case in which she has been embroiled, allowing her to eval-

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uate critically the convictions – formed without hearing the other side or an objective mediator's views – that have been driving the case.

2. Preview Your Trial Closing Argument in the Mediation Opening Statement.

You know already what you want your closing argument to be. You know the evidence you hope the judge will admit, the admissions you expect the opposing party will make, the concessions the opposing expert will acknowledge. Armed with that perfect storm, you stand ready to close the trial with a forceful argument that will leave the opposing party in tatters and his lawyer grasping for something, anything, to say in response. It would be a shame to waste such gripping rhetoric, and the mediation's opening statement may well be your only chance. Showing the opposing client how little you think of him, how appalling his conduct was, how sketchy his litigation strategy has been, and generally how you will make mincemeat of him and his themes at trial, will go a long way toward rendering him deaf to compromise and immune from the mediator's efforts to encourage him to bridge a remaining gap late in the day. The clients often enter mediation with passions at full boil after months of hard-fought, expensive litigation. Rather than using the opening statement to foster cooperation while politely but firmly laying out the strengths of your case, fan the flames of hostility. That way, when the individual caucuses start, the mediator and opposing counsel can spend hours talking the opponent back to the negotiating table. If you are really good at it, the opponent may even backtrack on his prior settlement position or threaten to leave altogether.

3. Choose An Automaton Messenger Mediator.

As clients and judges, mediators come in a wide range of temperaments and approaches. The mediator will be the only person involved who is impartial and has no stake in the outcome. The mediator also likely will be the only person involved who has not gotten so close to your case as to have lost a detached perspective. The mediator will be prepared after reading your mediation memoranda, and perhaps key case materials like court rulings, deposition transcripts, and central documents. Therefore, the mediator can be a powerful reality check when the time is right. But to sabotage the mediation, best to choose a mediator who will limit his role to carrying numbers between the caucus rooms. Better yet, choose a mediator who looks at you and your client as just that day's cogs in a featureless mediation machine and who, as a result, will not bother to establish a personal rapport with the parties to be able to judge what their specific motivations and fears are.

4. Don't Prepare Your Client.

Throughout the case, your client has heard only from you. Her only exposure to her opponent's lawyer was at the arduous deposition, in which she developed an understandable (even if unjustified) distaste for him and his tactics. Your client has seen the documents exchanged in discovery and read the transcripts of the depositions of other witnesses, but being a non-lawyer type, has not focused on how those documents and testimony fit within the legal constructs that will govern the case. She would understand the opposition's arguments and be able with your help to evaluate their strengths and weaknesses if you invest the time in explaining them to her. This preparation also would avoid surprises during the mediation day, enhance the client's confidence in you because you will have predicted the opposition's key arguments, and equip your client to respond

to those arguments in conversations with the mediator. Similarly, although your client may have never experienced mediation, no sense explaining to her beforehand how exactly the process works, what the mediator will expect, and what she should expect from the mediator and the opposing side. So, if we really want to sabotage the mediation, better to have your client walk in cold and be blindsided, leaving her angry, off balance and, thereby, not receptive to compromise.

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5. Insist On Minor Moves Until the Opponent Breaks.

As defendant's counsel, you have grudgingly evaluated the reasonable settlement range to be between $300,000 and $450,000. Plaintiff's opening pre-mediation demand was $1.5 million. You responded with a "We'll show them" initial offer of $5,000. At the mediation, the mediator wrestled the plaintiff to start with a $100,000 reduction to $1.4 million, and now it is your client's turn. After making the "we may as well leave now since plaintiff is in the wrong universe" noises, you reject the mediator's request that the defendant make a serious offer, and instead send the mediator back with $10,000. This prompts a half-hour caucus in the plaintiff's room, and the mediator returns with the plaintiff's "We can play that game too" response of a matching $5,000 reduction to $1.395 million. It is now past noon, both clients are frustrated and agitated. What to do now? The best way to sabotage the settlement prospects is: "Ok, fine! Here's another $2,000 (not even a matching $5,000 because we don't want them to think we are 'driving to the middle'), and we will keep doing this as long as they want! Until they make a meaningful move, we have no intention of doing so." Tell the mediator you "can't show weakness or impatience," and that if he doesn't bring back a "real number" next time, you and your client are leaving!

Of course, if you actually wanted to give settlement the best chance, you would recognize that there is little to be lost and much to be gained by making a real offer, signaling that you are prepared to negotiate in good faith. Paired with a clear message that plaintiff should not do any "midpoint math" or read anything into your offer other than the fact that you know what the case is worth and that you are ready to get down to brass tacks, a real offer is likely to prompt the plaintiff to markedly reduce his demand and allow productive negotiations to ensue. Most of a mediation usually is spent getting the parties to the Negotiation Range – the range in which each party is forced to start making difficult decisions. Before the Negotiation Range is reached, there is no progress. In the final analysis, it does not matter how you got into the Negotiation Range. What matters is that you got there. So, a prior move is no promise of a similar future move.

6. Don't Exchange Pre-Mediation Demands and Offers.

I once represented the defendant at a mediation that began at 9 a.m., but it was after 4 p.m. before the plaintiff made its first demand. Predictably, not much was accomplished that day. If you want to build some solid ill will, cajole your opponent into committing the time and money to a mediation, ignore his signals about what universe of values he sees as likely, don't tip him off to your intent to start the negotiations with a ridiculously high demand or offensively low offer, and hit him with that proposal for the first time after the joint session. That will show him!

7. Don't Use Your Client's Conciliatory Strengths or Hide His Irascible Tendencies.

Often, the mediation is the first (and sometimes only) opportunity for the clients to engage with each other directly as human beings. By the time the mediation day arrives after months and sometimes years of often acrimonious litigation, the parties have formed strong – usually negative – opinions about each other. "The plaintiff is a malingering fraud." "The insurance adjuster is just a pencil-pusher who cares only about not paying." That personal animosity is not conducive to collaboration and compromise. But if you are not careful, you could allow your client's positive human tendencies to make an appearance. If your defendant client can extend an olive branch without betraying any weakness, if she can humanize your side, if she can offer seemingly heart-felt regret that the circumstances have brought the parties to where they are, she can lower the temperature and encourage the plaintiff to move past unproductive anger and toward compromise. Likewise, if your plaintiff client can exhibit calm and reason, if he can convey that he is not out for blood but for fair compensation after a life-altering event, he can simultaneously show that a jury would find him a compelling witness and avoid unnecessary rancor in the defense caucus room. Sometimes cultural priorities are paramount. Once when mediating a wrongful death case stemming from the death of a Japanese tourist in a collision with a truck, an apology from the defendant's representative to the woman's Japanese family was critical to paving the way to productive negotiations, and the case settled quickly that day.

Of course, some clients just aren't cut from those cloths. Some simply are too angry to productively discuss their cases. Others are too snarky, too caustic. And sometimes the animosity between the parties is such that asking them to address one another would be counterproductive. In those circumstances, the lawyers have to carry the personal message in addition to addressing the legal aspects of the case.

8. Insist On the Cookie-Cutter Approach to the Opening Joint Session.

Some of these new-fangled mediators say that no two cases are the same, so no two mediations should be the same. Bunk. For decades most mediations have followed the established rote process of starting with a joint session in which each side's counsel presents an opening statement. Don't fix what's not broken. Oh sure, there are cases in which the lawyers and clients

already know their case and controlling law so well that opening statements only will antagonize and delay progress. And, sure, there are cases in which the tensions are so high that putting the clients (or even lawyers) in the same room would be counterproductive. But although mediation offers the flexibility to design the process to best serve the specific vagaries of each case, why customize a customizable process? Why let a mediator tailor the process to one that will promote the most promising negotiation?

9. Leave the Non-Monetary Details for Last.

Despite your hopes for a rousing trial victory, the negotiations are yielding promising results and the parties are approaching agreement on the settlement amount. But this being not your first rodeo, you have one last ploy in your arsenal. Your client had told you that she will not settle without a confidentiality provision. She also made clear that she would require the opposing party to agree to indemnify if any third party claims later arise. And, of course, she wants the ne'er-do-well defendant to post a retraction of his scurrilous public allegation. But rather than raise these potential deal-breakers with the opponent or the mediator before the mediation, or even during the earlier stages of negotiations, you have saved them for this last ditch effort to salvage war from the clutches of peace. So, after hours of painstaking offers, counter-offers, brackets, and counter-brackets, you send the mediator back into the other room with your best and final proposal accompanied by these additional conditions. If you are lucky, this will tank the deal. At worst, it will prolong the mediation several hours while the increasingly harried clients and lawyers haggle over these details which could have been addressed much earlier. So don't seize the momentum to resolution built throughout the mediation day and, instead, spring the onerous additional provisions at the last minute. Maybe, just maybe, you finally will tank the settlement, the parties will return to a war footing, and you will get to try this case after all.