Professional Perspective

# Avoiding Common Negotiation Miscues, Missteps & Mistakes

David S. Ross, JAMS

Bloomberg Law

# Avoiding Common Negotiation Miscues, Missteps & Mistakes

*Contributed by David S. Ross, JAMS*

It is well-established that confidentiality and cost-savings motivate many individual and corporate clients to choose mediation rather than litigation. Limitations caused by the Covid-19 pandemic have not changed the fact that clients prioritize protecting their privacy and reaching a quick resolution over a potentially pyrrhic victory in court.

As virtual platforms like Zoom, GoToMeeting, and Microsoft Teams prove as effective as in-person mediations, lawyers must continue to develop their mediation advocacy skills and hone them for all environments, including in-person, virtual and hybrid proceedings. This article explores how to avoid making mistakes that create unnecessary challenges for mediators and can undermine, or even derail, the mediation process.

Most attorneys recognize that they need both litigation and mediation advocacy skills to meet client needs. While these skill sets overlap, some can be decidedly different. Recognizing those differences—and developing an advocacy approach to accommodate them—can determine whether you simply settle a case in mediation or settle for the best possible terms.

When representing clients in mediation, lawyers should view their role through a simple lens: mediation as a facilitated negotiation. After all, people hire mediators when they can't resolve their dispute through direct negotiations or when they fear they will fail—or deepen the dispute—if they try. Hiring a skilled mediator, ideally with subject matter expertise, usually ensures a more productive process, leading to more optimal, durable outcomes.

Direct negotiations differ from facilitated ones in that most, if not all, communication flows through the mediator. And good mediators provide process suggestions and negotiation advice from start to finish. By accepting input about when and how to make offers and counteroffers, the negotiation dynamic changes, so advocates need to adjust their negotiation tactics and strategies accordingly.

Unfortunately, many lawyers negotiate the exact same way in mediations as they do in direct negotiations, increasing their risk of making tactical mistakes and limiting their ability to leverage the mediation process to their advantage. By better understanding how mediators change the negotiation dynamic, they can learn how to adjust, and improve, their negotiation approach and settlement results.

Lawyers should trust an experienced mediator to run a balanced and fair negotiation process. Nonetheless, lawyers must manage a systemic tension in every mediation between considering the professional advice of the mediator—who advocates equally for all involved parties—and zealously advocating for their client's goals. Managing this tension requires careful planning about how to build a trusting and collaborative relationship with the mediator while simultaneously negotiating assertively with opposing counsel through the mediator.

It can feel like a high-wire act, and requires patience and practice. As a general matter, you will be a more effective advocate by following one simple rule: Don't annoy the mediator, or your adversary, with your negotiation style or tactics. Ironically, lawyers who make the right choice to hire a skilled mediator often proceed to make the wrong choices about how to negotiate with and through the mediator.

Like a seasoned sailor who adjusts course to navigate the ever-changing conditions on the open waters, good mediation advocates use the mediator to help them tack right or left as the negotiation—often unpredictable and always influenced by the actions of the people across the table—unfolds.

Effective mediation advocates collaborate with mediators to advance their client's interests. When lawyers, or their clients, negotiate in unproductive ways—making it more difficult to resolve a thorny dispute—the process becomes less efficient, productive, and enjoyable, and is more likely to reach an impasse.

People work better with people they like and trust. When you ask the mediator to help you achieve a certain a goal at the end of a long day, you'll be better positioned to influence them—and your adversary—if you haven't breached anyone's trust or otherwise made yourself unlikable.

 

## Top Pet Peeves for Mediators & Opposing Counsel

Good mediators remain calm and decisive as they identify and address process roadblocks, such as strong personalities or irrational intransigence. Nonetheless, unhelpful negotiating behaviors can make our jobs harder and, perhaps more importantly, alienate the negotiators across the table, which can lead to cycles of retaliation.

Following are the most counterproductive negotiation behaviors and why they make the mediation process less efficient and less productive. When parties commit too many of these process no-no's—often because they think a particular tactic provides a negotiating advantage—they may actually weaken their client's negotiating position, and perhaps their chances of reaching a resolution.

***Lack of Preparation***

Lawyers must come to the mediation table fully prepared on the core factual and legal issues of the case. Unprepared lawyers force the mediator—or worse yet, the other side—to educate them, putting themselves in a compromised negotiating position and slowing down the mediation process. A lack of preparation hampers a lawyer's ability to advocate with confidence and credibility, and can limit the development of creative options, undermine principled and merit-based discussions about settlement value and lead to suboptimal deals or unnecessary impasse.

It's worth exploring what constitutes effective preparation. First, take the time to explain to your client, especially first-timers, how the mediation process works, including the role of the mediator. Doing so will reduce the deep anxiety people feel as they try to resolve high-stakes conflicts that involve money and strong emotions.

Second, ensure that you, and your client, identify and fully acknowledge all weaknesses in your legal position and the risks and costs of not settling. Lawyers should also be ready to address legitimate questions presented by opposing counsel or the mediator. To maintain credibility and encourage reciprocity, they should be equally ready to admit obvious weaknesses in their positions. Typically, too many lawyers overestimate their ability to wing it when pressed to justify how they value their case or how they will address clear litigation risks.

Third, help your client to articulate and prioritize their goals and interests well before the mediation session. People make better choices when they have time for calm reflection and don't feel pressured to make hard decisions quickly. Because you're bound to learn new information or hear new perspectives—from the other side or from the mediator—that will shift your view of settlement value, entering mediation with an immovable bottom line is not recommended. Having a clear understanding of a realistic settlement range, however, makes good sense.

It's worth noting that when people are in conflict, or feel they have been wronged or treated unfairly, they often experience strong emotions like resentment, anger, anxiety, and a desire for revenge. Those strong feelings make it hard for clients to focus on their true goals and interests. Often creating their own self-serving reality based on selective memory, clients tend to focus on vindicating their identity by proving they're right, often becoming unrealistic.

When it comes to representing a client in mediation, the best lawyers take time to connect with their clients as human beings, recognizing and validating their strong feelings. They also give them time and space to process some hard truths, like the fact that a jury might see the situation very differently than they do. Through open questions and light reality testing, lawyers should help clients recognize that the people across the negotiating table may have divergent perspectives on what happened.

Lawyers should prepare their clients for mediation by encouraging them to focus on pragmatic, forward-looking solutions. As a mediator, you always want clients to feel comfortable sharing their personal feelings and views about what happened and why. But a mediator's ultimate charge is to help them reach a workable settlement. So, at some point during the session, a mediator may have to suggest that the parties stop litigating the past and focus on the future.

***Stakeholder With Authority Is 'Unreachable'***

Mediators, no matter how good, cannot cement a negotiated deal unless each party has the authority to say yes. Not having a person with requisite authority at the mediation session, or not being able to contact one, presents a serious obstacle to settlement. Thus, lawyers need to confirm that all necessary decision-makers, with appropriate levels of authority, will attend the mediation session or, less ideally, be reachable by phone.

Of course, sometimes a decision-maker suddenly becomes unavailable for legitimate reasons. More often, however, one side announces mid-mediation that a key decision-maker "can't be reached," making it impossible to close a deal. These frustrating situations represent either a failure to anticipate the participant's unavailability or a negotiation tactic designed to scuttle or delay settlement to secure more favorable deal terms later.

Determining who has authority may require some probing. For example, the plaintiff's lawyers should consider asking whether the defendant's insurance carrier representative, if there is one, will participate in person. Securing the insurance representative's active and full participation can be helpful for all parties. On the defense side, lawyers should consider asking whether the plaintiff wants or needs a spouse, significant other, or support person to attend. First talking confidentially with the mediator provides a good opportunity to weigh the risks and opportunities of including another person at the negotiating table.

***Hyperaggressive Advocacy***

Hyperaggressive negotiating behaviors undermine a principled mediation process by making it less collaborative and less productive. While lawyers are expected to start negotiating from somewhat extreme positions—and initially signal that they have little flexibility—those positions loosen over the course of the day as each side compromises, creating a reciprocal dynamic that usually leads to settlement.

Hyperaggressive advocacy becomes more problematic when it arises, or escalates, later in the day. Hyperaggressive tactics can be particularly problematic because they often signal a lack of genuine interest in settlement and exaggerated intransigence may accompany a lawyer's negotiating strategy of limiting or preventing a mediator from speaking directly with a principal. These counterproductive tactics divert the mediator's time and focus from more productive work, like clarifying key legal issues and developing creative solutions for the parties to consider.

Effective mediation advocates should negotiate assertively to get the best possible deal for their clients. Experienced mediators respect strong advocacy but become concerned when negotiation tactics become too aggressive, alienating other mediation participants and unsettling the process. Such tactics include wildly high opening offers, or wildly low counteroffers, coupled with extreme and inexplicable inflexibility.

Other unhelpful behaviors include old-school hardball tactics such as stonewalling—refusing to make an initial offer until the other side makes one or refusing to share relevant and discoverable information, for example—intentionally mischaracterizing prior conversations and making "exploding offers" that expire after unreasonably short deadlines.

When advocates persist in using these tactics, they alienate the people across the table by sowing dislike and distrust. Mediators work hard to establish trust between the parties. Trust is a fragile commodity. Smart advocates know when to dial back unproductive negotiating behavior so as not to risk cratering the process.

***Using the Mediator as a Carrier Pigeon***

When lawyers insist the mediator simply bring offers and counteroffers from room to room, announcing them like an emcee at a boxing match, they lose the opportunity to leverage the mediator's expertise. Experienced mediators can usually manage this behavior either by ignoring it or persuading the lawyer not to do it by explaining why it's so unhelpful.

Still, treating the mediator as a carrier pigeon, and nothing more, can become problematic when used with extreme persistence. Lawyers, or their clients, who muzzle mediators—directing them simply to deliver their demands and parrot their legal arguments—often overestimate their own negotiating skills and always underuse the mediator's skills.

Mediators settle cases more efficiently and effectively when they are given the freedom and flexibility to share their candid assessments of the strengths and weaknesses of each side's legal position. Like a soccer coach who inhibits their players from playing with joy and creativity by constantly screaming directions from the sideline, mediation advocates should avoid micromanaging their mediator. Choose the right neutral, and then trust them to run a good process.

And all mediation participants benefit when the mediator can explain the rationale of a negotiating move, particularly when that move disappoints or angers the recipient, which happens a lot. Academic studies show that negotiators appreciate when an offer is explained and justified, leading to more productive, reciprocal responses. Trust in the mediator's communication skills helps prevent emotionally charged retaliatory responses that can derail progress.

 

Negotiations are usually grounded in and punctuated by strong feelings. The value of a mediator extends well beyond the ability to relay offers and counteroffers, and includes clearly explaining an adversary's perspective, offering creative solutions that meet underlying interests, helping principals appreciate the benefits of settlement, and objectively assessing the risks and opportunities of litigation.

Since virtual mediations prevent mediators from using water cooler moments for candid conversations, mediation advocates should be more aware than ever of limiting their freedom in other ways.

***Unwarranted Counteroffer Delays***

Lawyers who purposely and persistently delay making counteroffers can annoy the mediator and their adversaries, whom they need to make a deal possible. Unnecessary delays, by definition, slow the mediation process, and can derail it if the other side loses trust in the other side's seriousness about settlement or good faith.

Of course, effective mediation advocates should strategically time their offers and counteroffers, managing the expectations of the people across the table. Legitimately concerned that a hasty counteroffer may signal a weak negotiating position or over-eagerness to settle, advocates may choose to delay providing a counter until well after they decide what it is.

Sometimes, however, advocates go too far and weaponize time by waiting hours before making a counteroffer. Asserting that more time is needed or other delay tactics, advocates try to signal that the other side's offer was ill-considered and unreasonable—even if it's neither—and that their counter will be well-considered and reasonable.

The issue here is one of degree, and effective advocates calibrate the appropriate amount of time to wait before making their counter. Advocates should consider that in virtual mediations, when we usually sit alone in front of our computer, time seems to move in slow motion; one minute can seem like one hour. Taking cues from the mediator, who is shuttling between breakout rooms and gauging the emotional temperatures of each participant, can help.

Waiting too long—there's no science, just good judgement—can lead to a vicious retaliatory cycle by prompting adversaries to respond with the same extreme delay tactics or other aggressive negotiation tactics. This negative dynamic can quickly spiral, threatening the mediation by inexorably slowing the process, undermining trust between the parties, and triggering strong emotions and allegations of bad faith.

***Lawyers Who Prevent Clients From Meaningful Participation***

Some lawyers believe that they can negotiate a better deal by sharply limiting their client's participation and running the show themselves. These lawyers engage in heavy pre-mediation coaching, advising clients to speak carefully and infrequently, and actively shielding them throughout the mediation. Sometimes lawyers tip their hand by telling the mediator, "You're the captain of the ship," when, in fact, they feel the exact opposite.

Of course, skilled mediators navigate roadblocks placed between them and principals. Good mediators set expectations early by emphasizing before the mediation session that the process will likely require active participation and input from the principals. If a lawyer continues unreasonably to block access, a mediator may, in a private caucus, direct questions and comments directly to the client, explaining they're doing so to earn the client's trust or learn information the lawyer has not, or cannot, provide. Not wanting to offend the neutral or be perceived as fearful of what a client might say, most lawyers eventually accede.

But the problem becomes more difficult when lawyers demand to meet with the mediator only. If that approach impedes the settlement process, lawyers will become even more assertive by insisting they speak directly with the client, obviously in the presence of counsel.

To be clear, context matters. Some legal disputes can easily be resolved by working primarily, or even exclusively, with the lawyers. Most mediations, however, benefit from some level of client participation. In the end, the dispute belongs to the principals, and the lawyers serve as their agents.