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How to fail at mediation without really trying

Eight signs that your mediation is likely to fail and how to avoid the wasted time and expense

[Most how-to articles on ADR are written by mediators. The authors here offer the unique perspective of a founding partner and senior associate in a law firm best known for its work on the defense side. - Editor]

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Having a successful mediation is hard work. It is, however, extremely easy to participate in a failing mediation. It actually requires no work at all. The following are eight signs that your mediation is failing, some of which can be seen long before you even agree to mediate. In addition, we include for your reference what you can do to turn that potential failure into a success.

1. You are not prepared

This is, without a doubt, the starting point for a failed mediation. Whether you have any chance at a successful mediation begins well before the mediation, and oftentimes before a date for mediation is even set. By the time you get to a mediation, you must know your case inside-out, forward and backward. You must know the facts, both good and bad, and have them at the tip of your tongue if asked. You must know not only the strengths and weaknesses of your own case, but also of your opponent's case, better than he or she does.

There is a perception among some lawyers that all you need to do is throw together a brief the week before the mediation date and then show up. After all, the hearing is not before a judge, and nothing you say or do can be used against you. If that describes your preparation for mediation, you are headed for failure. Either the mediation will accomplish nothing at all while costing you time and money, or worse, you will end up reaching a settlement that favors the other party. The importance of proper preparation cannot be overstated.

What, though, does it mean to be prepared? The most obvious answer is that you know more about the case than the other side. However, mediations often fail where only one of the participants is prepared. You want to ensure that all participants come with the requisite information they require to resolve a case so that the inevitable "we need to do discovery on that" does not occur. Your preparation means you know your case and have reviewed any relevant law both in support of and against your client's position. By the time of the mediation hearing, you should know your case as well as you would for trial.

Additionally, bring with you those documents, deposition excerpts and demonstrative evidence that drive home important issues in the case. Recently, instead of just telling one side of what was said at a deposition, we were able to provide the transcript. Particularly for a carrier representative who is not present for discovery or a plaintiff who is not familiar with litigation, actually seeing facts testified to by your insured, or seeing your own words in writing under oath, is more forceful than merely an attorney for the other side telling you what he or she remembers from the deposition.

Preparation also involves ensuring that the proper individuals participate in the mediation. How many times has your mediation ended because the person with authority has gone home or a client wants to talk it over with someone before agreeing to terms? Whether the claims representative or adjuster needs to be physically present, as opposed to available by telephone, depends on the circumstances. It is not reasonable to expect an insurance representative to fly from New York to California on a case that is worth $50,000 on its best day. But, for a case that has the potential for a significant verdict or one that could climb above policy limits, if defense counsel is making telephone calls to his or her carrier, then it is not likely you will be cutting a deal that day.

Similarly, some plaintiffs rely on advisors other than their counsel. Just as a critical point is reached in negotiations, they wish to talk with someone who is not available. Last year, a plaintiff left the mediation to discuss the proposed settlement with her former attorney and never returned. Know who your client is relying on for advice.

Finally, you need to ascertain your potential hang-ups to a settlement as well as those of the opposing side. What is your sense of the other party's view of damages? Are the policy limits in danger or are there other significant coverage issues? Who is the major hang-up to a settlement: the carrier with the money or the defendant? Find out from opposing counsel where the other side stands and avoid a failed mediation.

2. You do not know the rules of the game — *Cassel*

Mediation has less chance at being successful if you do not understand the rules under which you are playing. The most important rule is mediation confidentiality, set forth in Evidence Code section 1115 *et seq.* Contrary to popular belief, this statutory scheme does not create a "privilege" that can be asserted, or

waived, by any particular party, but rather serves a public policy of encouraging the resolution of disputes by means other than litigation. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 132.) The key provision of the statutory scheme is section 1119, providing that no evidence of anything said or writing prepared "for the purpose of, in the course of, or pursuant to, a mediation … is admissible or subject to discovery…" (Evid. Code, § 1119(a), (b).) Section 1120(a) provides: "Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation." Finally, section 1126 provides that "[a]nything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends." Taken together, the statutory scheme provides that if a communication or writing is created specifically for a mediation, as opposed to created earlier for another purpose and then used at a mediation, it is confidential and not admissible as evidence or subject to discovery at any time.

Because mediation confidentiality is not a privilege, the provisions of the Evidence Code cannot be waived. Evidence Code section 1122 provides for the only two ways that a mediation communication can be made admissible. First, a communication or writing can be made admissible if: "All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document or writing." (Evid. Code, § 1122(a)(1).)

Otherwise, a communication or writing can be made admissible if: "The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation." (Evid. Code, § 1122(a)(2).)

An "oral agreement in accordance with Section 1118" requires all of the following conditions to be met: (1) the agreement is recorded by a court reporter or reliable means of audio recording; (2) the terms are recited on the record in the presences of the parties and the mediator and the parties express their agreement on the record; (3) there is an express agreement on the record that the agreement is enforceable and binding; and (4) the agreement is reduced to writing and is signed within 72 hours after it is recorded. In practice the parties will hardly ever make an oral agreement in accordance with section 1118 regarding confidentiality, particularly since the oral agreement itself requires a writing. Rather, if there is an agreement made, it will most likely be done in writing.

The terms of section 1122(a)(1) are fairly straightforward. If all participants to the mediation agree, and put that agreement in writing or make the agreement orally pursuant to the specific terms of section 1118, then the communication or document is later admissible. However, rarely will everyone agree in writing to make something admissible. First, it would take affirmative action on the part of all participants, which in and of itself can prove difficult in a large mediation. But the more likely roadblock will be that the party against whom the communication or writing is sought to be used will not agree. Thus, more often than not, the way to make a mediation communication admissible will be through the provisions of section 1122(a)(2).

Pursuant to section 1122(a)(2), if a communication or writing is made by or on behalf of less than all the participants, and it does not disclose anything said or done during the mediation, then that smaller group of participants, by whom or for whom it was created, can execute the writing (or oral agreement pursuant to section 1118) to make the evidence admissible. The purpose behind this provision is that a party wanting to first use a writing or communication in a mediation may later use the writing or communication at trial if the mediation is unsuccessful.

In drafting this section, the Legislature specifically considered expert reports or photographs prepared for the purpose of mediation. (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 420.) The legislative history of the statute shows that the chosen language was "expressly designed to give a mediation participant who takes a photograph for purpose of the mediation 'control over whether it is used' in subsequent litigation, even where 'another photo' cannot be taken because, for example, 'a building has been razed or an injury has healed.'" (*Ibid.*) This is no small point. If you do not settle at mediation, evidence you prepare for the purpose of mediation may not be admissible at trial. Knowing this can prevent a mediation failure which would occur long after the mediation hearing itself concludes.

Thus, it is important to know when a mediation ends for purposes of mediation confidentiality. The rule can be found in Evidence Code section 1125, and provides that a mediation ends when: (1) a written settlement agreement is executed, or oral agreement pursuant to section 1118 is entered, resolving the dispute or a portion of the dispute; (2) the mediator or a party provides all participants with written notice that the mediation is terminated (if the mediation involved more than two parties it can be wholly terminated, or terminated only as to certain parties); or (3) there is no communication between the mediator and any party for 10 calendar days, which time can be extended or shortened upon agreement. If a mediation does not resolve a case, you should analyze the potential probative evidence then available to you which may be subject to mediation confidentiality.

3. You did not discuss the mediation with your client

This may seem obvious, but oftentimes is overlooked. If you want to ensure a

successful mediation, you must discuss the mediation, and specifically what to expect, with your client. You must formulate with your client what is expected out of the mediation. This will help you formulate a plan going in and help you stick to it when you are sitting in that room waiting for the mediator to come back with an offer from the other side. Expect that, at some point in a tough mediation, the mediator will ask you for your bottom line or a bracket for settlement. The mediator may also offer a mediator's proposal. Know beforehand what your client's expectations are so you can know whether such discussion points are worthwhile.

It is equally important to know if what your client wants is doable. If it's an apology from a neighbor in a spiteful fence dispute, it is probably not going to happen. If they want an insurance company to indemnify your client for a future loss covered under the same policy, it is not going to happen. Money is not always the first and last consideration. Make sure your client has an expectation that can be realized in mediation, bearing in mind that creative remedies are more available at mediation than at trial.

Setting expectations

Explain beforehand your honest thoughts on a case, including its weaknesses in addition to its strengths. This can do wonders to curtail your client's expectations. You can explain to your client in unequivocal terms what going into a mediation means to him or her. The Supreme Court opinion in *Cassel* held that mediation confidentiality will effectively shield an attorney's actions during mediation, regardless of whether those actions are incompetent or even deceptive. While *Cassel* may be subject to legislative change, you should now be confident during the mediation process in giving a frank assessment of your clients' case, including the unpleasant or negative aspects. You should also emphatically advise your clients of mediation confidentiality, including the import of the *Cassel* decision on your relationship.

4. You paid no attention to when the mediation occurred

Choosing when to mediate is important. If you give no thought to this aspect, then you may be on the road to a failed mediation. Depending on the specific facts of your case, an early mediation may be appropriate, or it may be a disaster. If your case is a simple car accident case, where the facts are largely undisputed and the plaintiff 's injuries are fully ascertainable, then it may make sense to mediate before a lawsuit is even filed. Indeed, many contracts require an attempt at pre-lawsuit mediation. Conversely, if the matter is a complex intellectual property case, involving the testimony of several witnesses and complex expert analysis, then it may not be ready for mediation until just before trial when all the facts are known.

In most instances, something in the middle is appropriate. Most cases are not ready for mediation immediately upon filing because counsel, particularly on the defense side, do not yet know all the facts. Likewise, mediations right before trial are rarely successful since, by that time, the parties are ready to roll the dice given the substantial expense already incurred, including expert witness depositions and expenses.

In most cases, the best time to mediate will be after initial discovery has been completed, including the important party and third-party depositions, but well in advance of expert disclosures. This will afford all sides an opportunity to prepare for mediation while still allowing a party to save attorneys' fees and costs if they agree to settle.

5. You paid little attention to selection of the mediator

You may have heard some attorneys say they allow the other side to pick a mediator so they will be comfortable with the choice. Do not. Counsel can promise you that a mediator recently did a great job as a discovery referee only for you to find he loses track of who the participants are after the initial session. Or you can be told a mediator should be used because she is familiar with the area only to find she leaves by 1:00 p.m. so the parties negotiate alone, finding Wi-Fi at the local Safeway to draft the agreement at 1:00 a.m. These problems can be avoided by simply putting time and effort into selecting the mediator with opposing counsel. Frankly, if an appropriate mediator cannot be mutually agreed upon then the chances of a successful mediation were unlikely in any event.

6. One side is not participating in good faith

It is surprising how many attorneys participate in mediation just because they think it is required of them. If this describes you, then you most assuredly are on your way to a failed mediation. There is nothing requiring any party to participate in private mediation. Even the judge cannot order you to private mediation. (*Kirschenman v. Sup. Ct.* (1994) 30 Cal.App.4th 832, 835.) Thus, by agreeing to mediation in the first instance, you are essentially conveying to the other side your intention to engage in meaningful settlement discussions. To do otherwise is a waste of your time, your clients' time and money, and reflects poorly on you in the eyes of the opposing attorney. It may also have negative effects on your ability to resolve your case down the line, since opposing counsel will be hesitant to engage in further settlement discussions with you.

What constitutes good faith participation in mediation will always be a hot topic for attorneys. A typical scenario would be a plaintiff demand of "millions of dollars" with the defense response of "$5,000 if that is the demand." Both are insulting offers, leaving neither party participating in good faith. There is a reality to all cases as to their settlement value that is ascertainable to both sides. It is negotiation posturing which, in the vast majority of cases, makes for the comment that the other side is not participating in good faith. It is probably less than five percent of cases that cannot be resolved by mediation, and those can be identified fairly easily

by capable counsel. The good-faith participation in mediation is ultimately dictated by counsel.

You cannot be sanctioned for failing to participate in mediation, but once you agree to mediate and tell your judge that you so agree, your good-faith participation will be expected. If you have no intention of participating in good faith, then there is no point to mediation in the first instance, and you should save everyone the time and money. Similarly, if you sense the other side will not mediate in good faith, don't waste your time. A one party good-faith participant in mediation is a sure failure.

7. Loss of emotional control in joint sessions

Has a participant lost emotional control? This can come in many forms. Are you or the opposing counsel engaging in verbal barbs and rhetoric? Are the parties openly hostile to each other? Is the carrier taking the last demand as an insult or is the plaintiff feeling insulted by the low offer? As lawyers that are involved in many cases at the same time, it is easy for us to forget that most of our cases involve real people with a real dispute, many times personal. Your job is to control what you can, which is yourself, and to the extent possible, the people with you in the mediation. Sometimes this means avoiding the joint session all together. At other times, a joint session in which the parties can voice what is bothering them in a confidential setting is exactly what is needed. You, as the attorney, need to know the difference.

Two stories highlight how just a simple act, such as keeping one's cool, can determine whether a mediation is successful. The first was a wrongful death case with very differing opinions on both liability and damages. Everyone participated in a joint session, where the plaintiffs were able to get off their chest what they needed to say about their deceased mother. Before everyone left to their separate rooms, the defendant's representative made a point to seek out the individual plaintiffs and offer his condolences to each. He explained that while it was a lawsuit with differing opinions, he was truly sorry for the loss of their mother. This small gesture altered that entire mediation. Ultimately, a settlement was reached, with both sides giving a little to end the uncertainty of the litigation. That may not have happened without that gesture.

The other side of the coin was a mediation involving what was essentially a business dispute. There should have been no emotion involved whatsoever. However, a carrier representative, who was simply in a bad mood, was "offended" by an opening offer and never recovered. Over the course of an entire day, neither side moved off their original number. Moreover, nothing meaningful came out of the mediation because of the hostility shown from the start. Instead, it became a contest of wills, with neither side willing to budge.

8. Failure to execute a settlement agreement

Finally, if you are able to reach a settlement but put off the actual execution of the agreement, you run a serious risk of a failed mediation. However long it takes, it is imperative to get a fully executed agreement, signed by all the parties (as opposed to the lawyers) while they are physically present at the mediation. Mediation confidentiality rules provide that a written settlement agreement is admissible if any of the following conditions are met: "(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect; (b) The agreement provides that it is enforceable or binding or words to that effect; (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure; or (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute." (Evid. Code, § 1123.) Pursuant to Code of Civil Procedure section 664.6 a party may move to enforce a written settlement agreement and have judgment entered accordingly.

A number of years ago, after a long and contentious mediation session until 10:30 at night, both parties agreed to a settlement whereby plaintiffs would be paid $1.65 million. Plaintiffs wanted 24 hours to "think it over" and no written agreement was signed. Plaintiffs were to advise of their acceptance at a deposition the next day.

At that deposition plaintiffs accepted the offer and a notice of settlement was filed, removing the impending trial date. Plaintiffs then fired their counsel and refused to sign the release. Defendants filed a separate proceeding for breach of the settlement agreement which ultimately went to trial. That case was lost primarily due to application of mediation confidentiality to the settlement. A year later the original case went to trial which resulted in a defense verdict. Plaintiffs then sued their counsel from the mediation – unsuccessfully. All told, plaintiffs lost $1.65 million, all because a settlement agreement was not signed at the mediation.

Conclusion

As can be seen from these eight telltale signs of a failing mediation, avoiding failure, and turning your mediation into a success, is hard work and requires attention through the mediation and beyond. However, if both sides follow the suggestions above, then the mediation can be a success for all the mediation participants, whether or not a settlement is ultimately reached.


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