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ALTERNATIVE

# Top 10 Things



ART BY JAMES ENDICOTT

*Avoid aborting  
the process and its  
possibilities.*

BY SIMEON H. BAUM

**M**EDIATION is widely used these days. Federal court mediation programs have been in place since the 1990s; the Supreme Court's Commercial Division has a thriving Alternative Dispute Resolution (ADR) program; there are court-annexed mediation programs for specific areas — matrimonial, family, criminal court community disputes, landlord/tenant, and small claims court, to name a few. Agencies like the Equal Employment Opportunity Commission and quasi-governmental entities like the United States Postal Service have longstanding mediation programs, as do self-regulating organizations like the National Association of Securities Dealers and the New York Stock Exchange.

Beyond those programs, there is a growing use of private professional mediation. Corporations with pre-dispute ADR clauses, insurers with inter-company agreements, and attorneys with cases on

an ad hoc basis are regularly turning to mediators to help them resolve their disputes and save their clients the cost, disruption and aggravation of protracted litigation.

Given this burgeoning use of mediation, it is likely that most litigators, and many legal dealmakers, will find themselves representing clients in this process. It is thus imperative to understand the mediation process, its goals and possibilities, and to be effective in that process, understanding what works and what can abort the process and its positive possibilities.

It is just as important to understand what not to do in the mediation process. Here is a non-comprehensive list of 10 choices counsel or parties might make that reduce the likelihood of arriving at a mutually acceptable resolution through mediation.

**1. Insult the Other Party**

An agreement, which by its nature must be mutually acceptable, is the product of consent, not force. It is thus important to keep the other side willing and active participants in the dance of negotiation.

Offensive comments — such as calling the other party a liar, an incompetent, or a fool — are discouraging. They communicate a low likelihood of understanding the other. In the face of such comments, parties may conclude that there is no point in continuing because an offer based on so negative a point of view will be inadequate to the true value of what is at issue.

Offensive comments might gratify the speaker, but they anger the recipient. This

*Simeon H. Baum, president of Resolve Mediation Services, Inc. and an experienced mediator, was recently involved in the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site.*

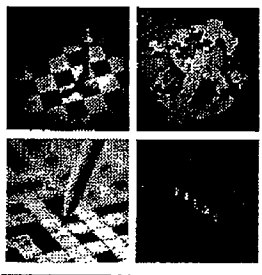
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# Not to Do in Mediation

can trigger primal responses — revenge (fight), defense, suppression, avoidance (flight), adding needless complexity to the other's communication.

At the core, the mediation process depends on communication. The mediator works to facilitate and enhance the quality of the parties' communication like a radio tuner. It is counterproductive to create static.

## 2. Give Up

Settlement opportunities are missed by quitting too soon. Often, the mediator, who has the chance to speak privately with each party, sees that a resolution is possible when the parties, having not been privy to all conversations, do not. Causes of premature departure include emotional reactions, frustrations with case assessment, and misreading of bargaining moves.

The converse of unwisely provoking a reaction through offensive remarks is succumbing to reactions to comments deemed offensive, and walking out. A good negotiator learns to sift negative remarks for the elements that might lead a party in good faith to make such remarks, and then addresses that content rather than reacting to the form.

Misunderstanding case assessment issues by either side may also prompt premature departure. One might be missing weaknesses that should be processed. If the other side does not appear to be getting it, the mediator should be given the time to work with that party in caucus to engage in reality testing. Time and gentle persistence can be the mediator's best tool; do not take it away. Confidentiality of caucuses prevents the mediator from reporting progress in the other party's case evaluation. Counsel should not conclude from silence that progress is not being made.

## 3. Focus Only on Dollars

Focusing only on dollars can mean missing integrative possibilities.

Mediation offers more than a settlement payment, and the mediation process is more than finding an acceptable number in a range formed by the extremes of low offer and high demand. While many settlements involve solely economic terms, there are times that openness to integrative possibilities, or a search for satisfaction of non-economic party interests, is key to reaching a resolution.

Mediators report business deals and new ventures emerging from the mediation of business cases. Employment dispute settlements can involve return to the workplace, reference letters, retirement or benefits packages, sensitivity training, and apologies. Even economic terms can be reworked to meet interests or party limitations through payment plans and contingent packages.

The ability to keep eyes open to non-economic interests produces surprising

results. In one case involving the reduction in force of a large number of workers emerging from a plant closing, the attorneys had arrived at a possible resolution, which several of the plaintiffs, including a couple of management "tag-alongs," were not ready to accept. Mediation permitted the strongest objector,

one of the management plaintiffs, to hear for the first time an explanation of the company's actions.

That plaintiff particularly objected that certain plaintiffs, in particular a widow with children, should be receiving more. This opened the door for the mediator to explore whether the man-

agement plaintiff would prefer to have the funds earmarked for him to go to the widow. As a testament to the importance of not overlooking altruism as a component of human interests, the management plaintiff agreed, and the case

Continued on page S10

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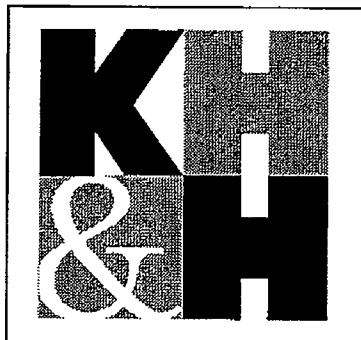
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## ALTERNATIVE

## What Not to Do in Mediation

Continued from page S5

settled. Plainly, a non-economic interest, and, indeed, a sense of identity, broke that impasse.

### 4. Gag the Client

Prohibiting your client from speaking during a mediation session misses various opportunities unique to this process.

Having your client speak during the opening in joint session can showcase a strong witness, giving the other parties and their counsel a sense of what things might look like if the matter goes forward. More importantly, however, the client's speaking in a non-trial mode lets the genuine story emerge naturally and efficiently, and can show the other party the real human impact of the issues in this mediation. It enables your client to go beyond marshalling the facts to present his or her core concerns and interests and make a genuine connection with the other party. This paves the way for real dialogue, which is impossible in a trial context.

Both in joint session and caucus, active participation increases client "buy-in" for the eventual settlement. This can be more efficient than a double negotiation of attorneys, as agents for their clients, with each other and then the negotiation of attorney with client, in effect of agent and principal.

In addition, both in caucus and in joint session, the party's direct participation enhances brainstorming, i.e., the generation of ideas as possible options for settlement proposals. Brainstorming works best if the participants agree to refrain from critical judgment as ideas emerge, so that parties' creative efforts are not inhibited. A party is in a better position than his or her counsel to make suggestions that reflect business needs or might satisfy the party's interests.

Permitting the client to engage with the neutral in analyses of the risks and transaction costs of proceeding with litigation enhances the value that the neutral brings. While some clients might criticize their attorneys as being less than zealous for raising possible weaknesses, risks or costs, the client is not likely to fault the mediator for raising these issues and concerns.

Direct engagement of your client with the mediator increases the chance that "reality testing" by the mediator might have an impact on the client. This is helpful in facilitating change. Conversely, counsel can always correct any misimpressions formed by this discussion, either in or outside of the mediator's presence. On "BATNA" analyses, it is the client's values and interests that govern an analysis of the "best alternative to a negotiated agreement;" and thus, it makes sense for the client to discuss this directly.

### 5. Balk at Emotion

The informal and confidential nature of mediation communications creates an opportunity for parties to express emotion and share their perspectives in a way that would be irrelevant or possibly damaging in court. This results in greater

satisfaction for the party and offers the chance of greater understanding between the parties. Advising your client not to speak may prevent critical comments, but the gain from a wholesale bar on emotional expression may be outweighed by the loss of client satisfaction and constructive impact of genuine emotion.

In one mediation, a broker, who had sat silently for an hour and a half, let loose his feelings of betrayal and frustration, communicating to a former customer that he had nothing to do with the losses in question and that this claim had a very negative impact on his reputation and career. The customer heard the message loud and clear, and a half hour later all claims against that broker were withdrawn.

Emotional expression by the other party can also be useful. "Venting" emotion, particularly if validated, frees parties to move on to constructive problem solving. It also offers a window into the concerns of that party, which counsel and your client can then seek to satisfy in their advance towards a deal.

### 6. Misread Late Demand or Offer

Mediation takes time, and each mediation proceeds at its own pace. Counsel should not expect mediation to occur at the pace of an in-court settlement conference, with numbers emerging within minutes from the meeting's inception.

There are times when development of facts, reality testing, and interest exploration may take hours. Sometimes the mediator may choose to work on adjusting expectations rather than communicate to the parties the extreme — and discouraging — number suggested in a caucus. And, there are times that a party's negotiation style compels that party to begin with an extreme offer and demand, regardless of whether it is already mid-afternoon.

On these occasions, patience is advised. If much work was done prior to the first and late offer or demand, then once the ball starts rolling, movement can be generated and resolutions can occur, despite the negative message that the extreme position seems to communicate. Trust the mediator, if he or she encourages counsel and parties to keep going.

### 7. Lack a Person With Authority

The mediation process works best when all parties are at the table and can be directly affected by the discussion; when their own participation generates the "buy-in" mentioned above; when their needs and interests can be fully and immediately expressed and explored; and, when decisions can be made on the spot.

Sometimes keeping the decision-maker apart from the negotiation creates the opportunity to renegotiate, to play "good cop, bad cop." This separation, however, can lead to bad feelings in the party that is present with full authority, or to a strategic withholding of fulsome proposals by the other party in anticipation of renegotiation, thus stalling meaningful negotiations.

Beyond this aspect, mediation involves transformation. Information learned during the process leads to adjustment and

**D I S P U T E R E S O L U T I O N**

accommodation, to compromise as well as collaboration. If the decision maker is absent, he or she will not be affected by the process. Missing the mediation gestalt, the absent decision maker might not fully appreciate the explanations of counsel or the on-site representative. Political factors might inhibit the on-site representative from giving a full blast of reasons to adjust the party's position. Presence of the decision maker eliminates these problems.

**8. Overlook Information Need**

Do not overlook the other party's need for information.

Mediating early in the life of a case, before discovery, increases the settlement pot and enhances cost savings. Yet, it is often predictable that certain parties will not settle without certain information.

Personal Injury matters typically require development of medical information. Coverage claims require development of policy-related information, or possibly information relating to the application for coverage. Property damage claims require development of proof of loss. Customer-broker securities claims require development of the profits and losses on an account, and might also require information about prior trading experience, e.g., in a suitability claim. Employment discrimination claims require, inter alia, development of mitigation efforts, current employment status and past compensation. Breach of contract claims require development of the contract terms, information relating to the breach and damages assessment.

Settlements occur based on certain assumptions. The mediation of most matters in which counsel participate will likely require development of information in order to satisfy the need of the other party before those assumptions are accepted. Conversely, your own willingness to resolve a matter under a certain set of terms and conditions is also based upon assumptions. To the extent information can be developed prior to the mediation to address these assumptions, one enhances the speed and likelihood of a resolution.

**9. Give an Ultimatum**

Prior to arriving at the first mediation session, prepared counsel and parties might have discussed their communication strategy, developed their case analysis, analyzed their BATNA, set their aspiration (best deal within the realm of realistic possibility) and assessed their "walk away." It is always advisable to keep these goals flexible and provisional, with the understanding that new information or insights gained from mediation might affect your analysis.

With all this preparation, it is still advisable to avoid making a "take it or leave it" demand. Negative consequences of the ultimatum include: (a) it can produce a reflexive reaction, needlessly ending discussions; (b) it hardens your own thinking, when additional information might fairly lead to an adjustment; and (c) it puts the party making the demand in a bind. Having made an ultimatum, one fights a credibility loss if it is not taken and one wishes to contin-

ue in the negotiation. But, walking out to preserve credibility may literally be cutting off your nose to "save face."

**10. Misunderstand Mediator's Role**

The mediator is a tremendous resource — a neutral third party, with effective facilitation skills, usually\* motivated to help parties reach a resolution. It is advisable to take advantage of what the mediator has to offer, and not to misunderstand what that is. Following are several roles not played by the mediator.

**Judge.** To arrive at a deal, you must convince the other parties, not the mediator. Some attorneys work hard to "spin" the mediator. While there is utility in helping the mediator recognize valid issues in a case, to aid in reality testing, this has limited value. Sometimes directing remarks to the mediator in joint session can deflect tension. Often, though, it makes sense to address comments generally to all present, or to direct them to the other parties. At a minimum, one must recognize that they are the real audience.

**Policeman.** The mediator can help set ground rules for the discussion, e.g., no interruption. But the mediator is a facilitator, and party self-determination is at the heart of the process. The best assumption is that the participants are autonomous adults, and that the mediator is not busy keeping everyone in line.

**Director.** Along these lines, while the mediator may suggest that parties break for caucus, address or defer certain issues, or undergo certain processes, because this is a party-driven process, counsel and their clients are free to make suggestions on the process or to express a preference not to undertake action suggested by the mediator.

**Dealmaker.** While the mediator might "coach" parties in caucus on the timing of offers and other negotiation strategy to keep the negotiation moving constructively, ultimately, the offers are from parties. Do not blame unacceptable proposals on the mediator.

**Adverse party.** Parties and counsel may confide in the mediator and take advantage of his or her unique position of having access to information from all parties and having a modicum of trust from all parties. Holding information back from the mediator can be counterproductive. Providing information enables the mediator to find solutions that defensive parties, not privy to information from the other party, might miss.

**Don't Forget**

Attorneys have the power to enhance the effectiveness of mediations. Awareness of what not to do may lead counsel to take approaches designed to elicit constructive responses leading to a resolution of the dispute.

1. Fisher and Ury popularized this concept in Getting to Yes and other writings. Understanding one's BATNA or "best alternative to a negotiated agreement" enables a party to have a basis for judging whether a proposal is worth taking, or whether the party would do better without this agreement.

2. In the transformative mediation model, the mediator's purpose is not settlement or problem solving, but fostering empowerment and recognition in the parties. See, Bush & Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (Jossey Bass, Inc. 1994).

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