By Paul A. Rubin

10 Ways to Foul Up a Mediation

More than a decade ago, the *ABI Journal* published an article describing a successful mediation.[1] While that article is still recommended reading as a primer for the uninitiated and serves as a useful reminder for seasoned professionals, the time has come to publish a sequel. Real-world experience teaches valuable lessons, although learning them can sometimes be painful. This article provides suggestions for mediators, counsel for mediating parties and judges — who rely on mediation as an efficient tool to resolve disputes, avoid the costs, delay and burdens of continued litigation, and conserve their time, energy and resources — on how to avoid ruining a mediation.

The approach taken here is to focus on "what not to do" in connection with the mediation of an adversary proceeding or a contested matter in bankruptcy court. To be clear, these are recommendations and observations — not hard-and-fast rules. Some flexibility is always required, because each situation might involve unique circumstances warranting different approaches.

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10 Mistakes to Avoid

Mistake #1: Not Setting a Time Limit for the Mediation

Bankruptcy judges are typically quite considerate and generous in affording the parties ample time to complete the mediation process. However, there is the risk that if no deadline for completing the mediation has been set, it can drag on for an excessive period of time.

Undue delay in the conduct of a mediation can have a negative ripple effect on other parties-in-interest who are waiting to find out whether the mediation has resulted in a resolution and, if so, upon what terms. If the court is hesitant to set a deadline for completing the mediation, it might at least set a deadline for conducting a mediation session to ensure that the mediation proceeds. The parties should not resist setting time limits, because if the parties and the mediator believe that an extension of the deadline makes sense, it is almost certain that the court will be amenable to a reasonable extension.

Mistake #2: Failing to Interview Your Client in Advance

It is critical to avoid unpleasant surprises. Counsel needs to inquire as to whether the client is under legal or other constraints that would affect its ability to settle.[2] The mediation session cannot be scheduled for a time when an essential decision-maker or source of information for the client is unavailable. The client might have an outside financial or other advisor without whose input it will be unwilling or unable to settle, and if so, it might be necessary for counsel and the mediator to communicate with such individual(s) to overcome what might be a barrier to settlement.

In addition, there might be non-monetary considerations that are driving your client's settlement position. Probing questions must be asked at the outset of the process.

Mistake #3: Not Requiring the Parties to Submit and Exchange Mediation Statements

When the parties have fully briefed their dispute in court filings, they might simply want the mediator to review the court papers and dispense with the submission of mediation statements. However, it is important to require that each side provide a statement that includes its current perspective concerning the dispute, identifies the core arguments and principal authorities that it claims to support its position, and describes its understanding of the history of settlement offers that have been exchanged. The dispute might involve a combination of contested matters, adversary proceedings, litigations in state or federal court, and appeals. The mediator needs to understand what arguments, documents and matters the parties deem significant, and which are deemed to be of lesser consequence.

Some mediators do not require the parties to exchange mediation statements. This is a mistake, as the parties must share opening and reply mediation statements. In this context, ignorance is not bliss: It could lead to unwarranted overconfidence. A reality check is appropriate. Each party should be forced to review the other side's statement and respond to the critique that the other side has advanced. It is not productive for a party to with-

1 Paul A. Rubin, "10 Tips for a Successful Mediation," XXXIII *ABI Journal* 11, 40-41, 66, November 2014, abi.org/abi-journal/10-tips-for-a-successful-mediation (last visited on Feb. 18, 2026).

2 In one case, it was not until hours into the mediation session that an individual defendant disclosed for the first time that he was subject to a consent order that limited his ability to make payments without prior authorization of the judge presiding over his divorce proceeding.

hold arguments, authority or documents from the other side. Moreover, there is no justification for a party to wait until the mediation session to unveil case law or facts supporting its contentions.

Mistake #4: Foregoing Independent Research, and Not Speaking to the Attorneys Before the Mediation Session

Upon reading the mediation statements, the mediator should not simply accept all characterizations of the case law and the factual contentions at face value. It is useful to ascertain whether key decisions cited in a mediation statement have been described accurately. The mediator should also take the time to perform independent research because there might be case law or pertinent issues that have been overlooked. The presentation of contrary authority to a party that was not cited by its adversary can have an impact. If the mediator found such case law, it is fair to assume that the bankruptcy judge or a law clerk will also find it.

Walking into the mediation session cold without an understanding of the parties and the underlying concerns they might have is not a recipe for success, so it is worthwhile to speak with counsel before the mediation session. The mediator should ask open questions about perceived barriers to settlement. "Is there anything not written in the mediation statements you want me to know?" "What can you tell me about the person(s) who will be attending the mediation on behalf of the client?" The responses to the mediator's questions might be illuminating.

Mistake #5: Conducting the Mediation Remotely When It Could Be Held in Person

Out of necessity, mediations were conducted remotely during the COVID-19 pandemic, but now there is a choice. To be sure, it is evident that cases can be settled through mediation without in-person appearances. Depending on the amount at issue and the number and location of the parties, it might make sense to conduct the mediation session(s) via videoconference even though face-to-face sessions are possible.

Generally speaking, there should be no doubt that holding the mediation session in person is strongly preferred. The mediator's impact is diminished when a participant is riding in a car, walking around holding a laptop, or sitting at a desk looking at multiple screens during a videoconference. Moreover, there are moments in a mediation session where a party's complete and undivided attention is absolutely necessary. No matter what commitments are made about steps that will be taken to avoid interruptions during a remote session, do not take the risk of unwanted disruptions. The bottom line is that mediation is more effective when the mediator can talk face-to-face with the parties.

Mistake #6: Skipping the Joint Session

A cynic might say that the joint session does not serve a useful purpose because the parties will merely restate what they wrote in their mediation statements, and it is preferable to avoid the risk of an exchange of sharp words that could destroy the desired atmosphere of cooperation. However, the experienced mediator knows that the joint session actually provides an opportunity for each party to articulate to the other side any specific messages that it wants delivered, in the manner in which it wants its points conveyed. The joint session also presents an opportunity to clarify factual matters that might appear to be unclear, and for a party to try to demonstrate its good faith to the other side.

Even if the parties have little to say at a joint session, it is a defining stage at which the mediator can frame the issues for both sides, ask questions about the record or the parties' respective positions, attempt to narrow the parties' differences, manage expectations, and perhaps most importantly explain why the mediator believes a settlement can or should be reached. The parties should leave the joint session convinced that the mediator is deeply committed to helping them reach a settlement.

Mistake #7: Disregarding the Role of Experts

It will be apparent if the parties are basing their legal positions on expert opinions. In this case, it can be extremely helpful to have each side's expert participate in the mediation session. Stated differently, it might be impossible to settle unless the mediator is able to speak candidly with the parties about the strengths or weaknesses of the expert opinions underpinning their position.

Mistake #8: Ignoring the Need for Discovery

The parties might have agreed to try mediation before spending time, effort and money on discovery, or, when directing the parties to mediation, the court might have issued an order staying discovery. However, the parties might determine that they are unable to make intelligent decisions regarding settlement without the exchange of pertinent documents or information on an informal basis. The mediator should be prepared to supervise and help facilitate informal discovery, which might necessitate holding conference calls with the parties to monitor the status of the information exchange and even playing the role of referee should disputes arise regarding the extent of disclosure that is appropriate under the circumstances.

Mistake #9: Just Being a Messenger

When the parties start making offers and counteroffers, the mediator's job is not simply to convey the proposed terms accurately and solicit a response.[3] The mediator should candidly discuss the benefits and drawbacks of the offer, and it might be appropriate for the mediator to assist the recipient of the offer in formulating a response.

If the mediator feels that the proposed response is insufficient, say so and explain why. The goal is to build and maintain momentum. Just serving as a courier is inadequate.

Mistake #10: Agreeing to a Settlement Without Adequate Consultation, then Backtracking

Perhaps the last thing that a party should do is agree to a settlement at the conclusion of the mediation session, then

3 Failure to convey all elements of a settlement offer accurately in clear and unambiguous terms is another way to ruin a mediation.

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renege due to considerations that were overlooked before and during the mediation session. For example, once publicized, the amount of a settlement in the present case might affect the defendant's ability to settle other cases for lower amounts. A party might realize too late that a settlement has adverse tax consequences or adversely affects the client's budget-planning.

Do not let this happen to you. Do your homework before the mediation session, consider the ramifications of the settlement terms during the settlement negotiations, and consult with the appropriate parties before confirming your agreement to the terms of settlement.

Conclusion

The foregoing discussion is not exhaustive. There are many ways to foul up a mediation, by action or by failing to think and act. Nevertheless, every mediation requires a modicum of optimism.

Accordingly, to conclude on a positive note, mediating parties are urged to bear in mind at all times the most important bankruptcy opinion never written: *In re Common Sense*. This case teaches, among other things, that when approached in the spirit of good faith with a genuine commitment to professionalism, mediation can transform the adversarial battlefield into a collaborative effort that enables parties to reach a more advantageous outcome than that of a protracted litigation. abi

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