Mistakes Mediators Make

by William G. Bassler and Jack P. Levin

A mediator is a peacemaker traversing an uncertain landscape with only an olive branch in hand, and never sure of the commitment of those who have asked him or her to undertake the journey. If this seems like a romantic and dramatic perspective on the work of the mediator, consider the unlimited varieties of people, disputes, and situations the mediator faces in his or her career. By definition the mediator works alone and in strict confidence, and so most often must look within for approaches and solutions tailored to the particular assignment.

The solitary and private nature of the work makes it difficult to learn how to be a successful mediator. Most how-to books and articles are written at a level of generality that in the long run is not very helpful. Consequently, this article focuses on specific pitfalls and missteps mediators have encountered. Of course, any list of potential mistakes could also be expressed as a series of affirmative recommendations, but stories of peril are often more instructive than stories of virtue. As there is no map for conducting mediation—each one is a learning experience, and therefore an opportunity for teachable, if sometimes painful, as well as satisfying, moments.

What follows is by no means an exhaustive list of potential mistakes that can place roadblocks in the way of a successful mediation. Each item can easily be read as advice to lawyers and clients, as well as to mediators. Although mistakes are being discussed, it may be that in mediation more so than in other pursuits, there are times when what would usually be a mistake is instead an opportunity. As in all pursuits, mistakes are to be expected. The mediator intent on making no mistakes or avoiding criticism may be too cautious to create, much less keep, the peace.

Mistake #1: Thinking the mediation doesn't begin until all the parties and their counsel meet in session.

It's a familiar ritual: The mediator is appointed. A conference call with counsel is arranged. Mediation statements not to exceed 10 pages are to be submitted to the mediator by X date, and a mediation session to be attended by parties with authorization to settle is set for Y date. Nothing else happens until the session, when the mediator spends time in caucus learning about facts and feelings while the other side sips tepid coffee wondering what is happening and whether the exercise is worth it.

In this scenario, too much has been left until the day of the actual session. Several opportunities have been missed. First, not every case requires that the parties invest the time and expense required for mediation statements. Often, there are pleadings and motion papers that more than adequately inform the mediator about the dispute. However, what the mediator really needs to know may never appear in paper such as what is the real conflict underlying the dispute (*e.g.*, a personal falling out unrelated to the claim), what has been done or not done to resolve the dispute, and what contribution can the mediator make to create a process that will work for these particular parties.

Often a confidential mediation statement or a call from the mediator will reveal what one side sees as the real stumbling block to a resolution of the issues. The point is that a mediator should be as active as possible *before* the mediation session to insure that the parties and the mediator have the information they need. Like the negotiation of a treaty, all possible preparation should be done before the principals meet on the designated day. Preparation also contributes to the formation

of trust between the mediator and counsel, and where possible with the client.

Mistake #2: Assuming the parties and their counsel have the information they need to mediate.

Even when the mediation occurs well into discovery, critical information may be missing. The mediator needs to be alert to any gaps, because this information can sometimes dispel misplaced legal positions and misunderstood factual assumptions. This may mean that information that might otherwise take weeks or months to exchange, should be expedited for purposes of the mediation. It isn't always easy to get parties to give it up, but a good mediator should be persuasive when it comes to information that enables parties to negotiate on a level informational playing field.

Of course, sometimes the facts just aren't there, but that fact can be equally valuable for all parties. Getting the parties to focus on what is really important before trial can streamline the issues for trial, and often contribute to a resolution of the dispute. Either way, the mediator should make sure the day of mediation doesn't arrive with unnecessary gaps in the parties' knowledge.

Mistake #3: Assuming parties who have agreed to mediate are willing and prepared to do so.

Mediation may occur because it has previously been contracted for, because it has been court ordered, or because the parties have decided to try it at some stage in their dispute. However, it is a mistake for the mediator to assume that because the parties have engaged him or her, they are themselves engaged in the process.

Sometimes counsel are there to appease the court; sometimes the parties are there to appease their counsel; and there are even times when one party is simply there to test the resolve of the other side.

The phrase 'party autonomy' emerged to indicate that the process belongs to the parties. That said, the lawyers may not even know how to mediate, and some or all concerned may be passive or even hostile. But this presents yet another opportunity for the mediator. When parties go to mediation, only one thing changes for sure—a new person has entered the room. That new person, by force of talent, experience, personality, skill, commitment, and persistence, can make the difference between a perfunctory proceeding and a relationship-altering experience. By engaging counsel and, when possible, the parties, in advance of the mediation session, the mediator may be able to create an environment where mediation is seen as a significant opportunity, not just a meaningless formality.

Mistake #4: Assuming being named as mediator is the same as being trusted.

Being named as mediator is only an opportunity, and because mediations are by nature between or among parties, and often counsel, who lack trust in each other, trust in the mediator must be earned early and maintained. Parties and their counsel may be extremely sensitive to what they perceive as unfairness, disinterest or laziness on the mediator's part.

A mediator goes a long way toward earning that trust by being prepared, which means being familiar with the facts and having a working knowledge of the applicable principles of law. Also critical is the ability to try to really see how the parties view their respective positions.

Nothing destroys a mediation faster than the mediator's gratuitous and premature assessment of the merits of the case. The mediator must never be seen as going through the motions, even when that is what a party seems to be doing. The mediator must always assume what he or she is doing is critical to maintaining trust, and therefore the opportunity for a good outcome. It is often true that in mediation the only person who is trusted is the mediator. That may be the mediator's greatest contribution. It must never be squandered.

Mistake #5: Believing people mean what they say.

It is axiomatic that in a successful mediation—which the authors define as one in which parties make progress toward resolution—the parties will either alter their positions or be willing to look at alternatives they either previously rejected or had not even imagined.

The clearest example of this process is the conventional negotiation where the 'bid and asked' change, and the parties eventually inch toward an agreed on number. Of course, when a specific offer, say, of dollars, is made, the mediator and the other party must be able to rely on that number. But as a general matter a lot is said in mediations—about positions, facts, law and attitudes—that may change. Indeed, those statements may be outright misrepresentations designed to 'game' or mislead the mediator as well as the other side to one party's advantage. The mediator should never assume that what was said yesterday, or even five minutes ago, is a party's fixed belief or position.

In mediation, change is the constant. At the same time, while the mediator may question or gently challenge a statement, he or she should never express distrust of a party or counsel. A position of detached curiosity is appropriate. It is expected that the mediator may play devil's advocate. The effective mediator will be forward-looking, because resolution is found in the future, not in re-hashing old arguments or indulging old feelings. The mediator should listen carefully and, where possible, sympathetically to everything, and then lead toward change that may produce resolution.

Mistake #6: Squandering opportunities to lead.

Mediators are trained to believe, and are committed to party autonomy. Mediators are not invited into a dispute to hector, preen or push people around. There are times, however, when parties and their counsel, whether they say so or not, are desperate for the mediator to make a recommendation, even suggest a course of action. It is not uncommon for a lawyer to be a prisoner of an unreasonable client.

The lines between facilitative, evaluative, and transformative mediation are not finely drawn. Particularly in emotional situations and ones where continuing relationships are at risk and may be preserved (or constructively severed), the mediator may be the only one in the room in a position to lead. Leadership is not the same as dictatorship. A leader in such a setting is someone others follow willingly, but the leadership must be appealing. Such moments often will not present themselves until well along in a mediation, but the mediator should be alert to them. Don't squander the opportunity to lead. The moment may be fleeting and when it occurs, the conscientious mediator should step forward.

Of course, it could turn out to have been the wrong time, but disputes are human affairs, not scientific phenomena. Mediators have instincts honed by experience, and thus should trust those instincts when experience has proven them reliable.

Mistake #7: Giving up too easily.

Mediation is increasingly accepted as a legitimate and even valuable process, but progress in mediation is still hard work. The parties have usually invested a lot of money, time and emotional energy pursuing their versions of fact and interpretations of law offered up by their lawyers. Whether called momentum or inertia, it is difficult to call off a war, especially when the biggest battle has yet to be fought.

The mediator can sometimes do more than tell the parties what they already know—that litigation is costly and risky. There may be possible future business relationships the parties haven't considered. Parties may have benefits to offer that are worth more to the other side than the obvious cost. The mediator should not be afraid to point out collateral risks that a party is well-advised to avoid by settling the dispute (*e.g.*, the as yet unproduced emails revealing problems with third parties completely unrelated to the dispute). There may be business and other opportunities lost from other sources while parties are locked in struggle.

And yet, parties may reach what appears to be impasse. This may seem real, but all that may be needed is a break in discussions. The mediator must appreciate that he or she will never know everything that is going on. The passage of time alone can cause parties to see things from a different perspective. Sometimes being away from the mediation gives parties time to reflect. So what appears to be an impasse may not be permanent. Ask everyone to take a breath. Maybe everyone should just quit for the day and schedule another day. Frustration, especially the mediator's, should not cause a mediation to fail.

Mistake #8: Not knowing when the mediation should be adjourned or concluded.

When to hold and when to fold doesn't just apply to poker. There may come a time when it is clear that nothing more can be accomplished, at least not at the present time. The process has degenerated. People are becoming angry, not conciliatory. The mediator may see this happening before the parties do. If the mediation is not constructive, it is not serving the parties. Success in mediation is to be measured in issues agreed upon, distance reduced between bid and asked, understanding in place of ignorance concerning important facts. But not all progress takes the parties across the finish line.

A wise mediator knows when nothing more can be done, at least at the time. A mediator preoccupied with achieving a settlement may be putting ego before the interests of the parties. Any mediation can be resumed, unless the parties have lost faith in the process or the mediator. It's up to the mediator to make sure that doesn't happen.

It is the authors' hope that this article has contributed to the education of the mediator seeking to hone his or her skills. Next to the prevention of conflict, the resolution of conflict is one of society's most important goals and values. It is for this reason the peacemaker is called blessed. ⚖

Hon. William G. Bassler *is a retired United States district judge for the district of New Jersey. He is now a full-time arbitrator and mediator and adjunct professor teaching arbitration at Fordham University Law School.* ***Jack P. Levin*** *is a senior litigation partner in the New York office of Covington & Burling LLP. He specializes in alternative dispute resolution, including acting as an arbitrator and mediator and advising clients on strategies to avoid and manage conflict.*