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Three reasons mediations fail and three ways to move forward

A PANEL OF MEDIATORS DISCUSS WHY SOME MEDIATIONS ARE NOT SUCCESSFUL, AND WHY THAT'S NOT THE END OF THE ROAD

It's 5:45p.m. You're hungry. Your client is antsy. Everyone's nerves are on edge. The mediator has been taking longer and longer to come back between rounds. Today's mediation, which started out with such promise, has fallen apart. The numbers weren't where you expected them to be. Each round had limited movement. Tempers flared. A few choice words were exchanged, along with the disappointing numbers. It's clear that this current round will be the last one.

When the mediator finally knocks on your door, her carefully neutral expression telegraphs what she's going to say. The day is done. The mediation failed. Now what?

First step: Assess the situation

As with any failure, it is critical to first process the event. Those who don't learn from history are doomed to repeat its mistakes. You'll proceed more effectively if you grant yourself some space to adjust.

Acknowledge the setback, first to yourself, and then to those in your reporting circle. Acknowledging a setback doesn't require finger-pointing or blame-shifting. Before digging into the whys and hows, you must first accept the loss you've experienced.

The loss of time, money, and resources deserves to be recognized. It's the natural starting point for moving ahead. Check in with yourself. How do you feel? When's the last time you felt this way? What do you want to say or do? Are you motivated by practical considerations or emotion? Are you acting or reacting?

No one plans to fail. A range of negative emotions is typical. For parties new to the legal experience, this fresh rejection can be as divisive as the underlying facts of the original dispute. Even for experienced lawyers and sophisticated businesses, the surprise of upended expectations can sow seeds of doubt and mistrust. Label these as normal reactions: yes, failure stings.

Yet, there's every reason for hope! Failed mediations tend to herald a common pattern: the parties regroup, the mediator persists, and a resolution develops in the ensuing weeks. This article will discuss the nuts and bolts of that process.

Remember that a mediation is a snapshot in time: a single day when the parties did or didn't reach agreement. Often, failure catalyzes those involved to redouble their efforts at communication

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and compromise. Issues which were sticking points can become unstuck with time, patience, and concerted effort.

This disappointment is one step in a journey. As Churchill said, "Failure is not fatal: it is the courage to continue that counts." Hope allows you to move forward in a more receptive state, because you'll be focused on the future instead of the past. From a position of clarity, you can evaluate what happened and where to go next.

Three reasons why mediations fail

In researching this article, I had the privilege of interviewing more than a dozen long-standing members of the industry, including mediators, plaintiff's counsel, and defense counsel. Many graciously consented to being quoted, as reflected below. Others requested anonymity in order to more frankly share their perspectives on this delicate topic.

Despite the panel's diverse range of experiences and viewpoints, their responses converge on a few clear principles. I incorporate both their insights and my own personal observations.

While every case is unique, mediation failure can typically be explained by three problems: mistakes in valuation, asymmetric information, and emotional investment.

Reason #1: Mistakes in valuation

This seems obvious: The parties didn't settle because they couldn't agree to a price. However, there is more to the story than "the other side got it wrong."

Case valuation is a sophisticated and nuanced skill. It incorporates external facts, such as industry sentiment and jury awards. But it also requires self-awareness and neutrality. Is your case as good as you believe, or are you drunk on your own Kool-Aid? This is essential in calibrating your client's expectations. Finally, communicating and justifying your valuation is an art. "Me, right; you, wrong," rarely persuades the other side.

It's helpful to be aware of possible trends. For instance, in my own specialty of employment law, I've noticed that some cases are settling for more than in years past. What are others observing?

Eve Wagner, a mediator with Signature Resolution, typically mediates five days a week. She observed that employment case valuations have appreciated over time, particularly those pending in Los Angeles. "Over the past several years, there have [been] numerous seven-figure verdicts, as well as eight and even nine in employment cases. For example, in 2014, a federal jury awarded $186,000,000 to a former female employee, finding gender and pregnancy discrimination. These verdicts have been used to support higher demands and settlements."

The Honorable Enrique Romero (Retired), a mediator with Signature Resolution, estimates that he mediates 150-200 cases annually. He agreed that employment valuations have increased, "given that many have gone to trials and juries across the courts in California are awarding substantial damages."

Michelle Reinglass, a mediator with Judicate West, mediates approximately 500-520 times a year. From her perspective, the value of employment cases over the years is steady overall, "but the more meritorious cases seem to have increased."

Katherine Edwards, a full-time mediator and independent investigator, conducts approximately 110-130 mediations annually. In her observation, "case values seem to have increased" as plaintiffs rack up "bigger and bigger jury verdicts and seem more willing to try cases (despite employment lawyers typically settling the good cases and trying the bad ones!)."

Others, such as Neil Pederson, a plaintiff's counsel and senior principal of Pederson Law APC, and Amy Patton, a defense counsel and partner at Payne and Fears LLP, report seeing no meaningful change in case valuations in recent years.

Of course, only you can decide how much you think a case is worth. But tapping into the zeitgeist can help ground your estimation and give insight into what the other side may be thinking.

Reinglass cited "excessive overreaching" as one reason cases don't settle. "This may occur when someone has not fully evaluated the ups and downs of their case, focusing only on the 'ups' for their side, which compels assigning a 'best case at trial' valuation on their moves."

Edwards finds a valuation gap is often influenced by external factors. She said that cases fail to resolve when the parties' settlement expectations are out of the "market range," which can be for reasons such as a demand that the plaintiff resign from a career position, personal or religious beliefs, and outside influences like spouses and attorney-family members.

She also cited "institutional opposition." For example, problems can arise when a dispute implicates a key aspect of company culture. She warned that "principles cost principal!"

Melissa Petrofsky, a defense counsel and principal of The Petrofsky Law Firm, observed that failed mediations "settle eventually, and usually result in more money to the plaintiff." Typical reasons, she said, include defendant "sticker shock" and insufficient settlement authority.

Communicating your valuation well is just as important as the valuation itself. Reinglass discussed poor signaling as one reason mediations fail. "Examples include a plaintiff who expects to settle for $75-100k, starting out at $1.5 million. Alternately, when a plaintiff gives a reasonable opening number, and a defendant opens at $1,000. These actions result in spending the first part of the mediation on everyone's 'pisstocity' at the other side's numbers. It also engenders pessimism whether the case will be able to settle at all." Consequently, "good moves made [later] receive much less fanfare, credit, or appreciation from the opposing side."

Edwards observed that some cases don't settle because of "miscommunication about the range of settlement." She cited pre-mediation posturing statements such as, "I told you

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I would never take under six figures," or "I told you we would never pay in the six figures," as possible hindrances to success.

Considering the sensitivity of communicating a settlement position, it may be wiser to leave the signaling to the mediator.

Reason #2: Asymmetric information

Understandably, you may hesitate to share information. After all, divulging facts reveals parts of your playbook and depletes your arsenal. Yet, if you do not share facts, your opponent has no reason to believe what you say.

The tension between hiding information and revealing your strengths is highlighted after a failed mediation. A common reason for mediation failure is that the parties lacked a shared factual grounding.

Reinglass opined, "When that important information is produced during mediation, particularly if it's a smoking gun or a game-changer, it may dramatically impact the valuation by the other side." She added that a defendant or insurance carrier may have insufficient authority and needs to "escalate it up to a higher level, which cannot get the case settled today."

Reinglass continued, "Plaintiff should want to turn over all documentation to support their damages and claims. Defendant should want to turn over all documentation to support their actions taken against Plaintiff, and their defenses."

Petrofsky highlighted a "dry run" as another benefit of transparency: "Even if the parties don't settle on the first try, mediation is an opportunity to test your case in a confidential setting. You'll never again have the opportunity to present your client, your arguments, and see your opposing party's credibility and arguments before trial."

Reason #3: Emotional investment

Our legal system is an improvement over vigilante justice, fisticuffs, and duels at dawn. But just because there isn't blood doesn't mean there isn't hot-bloodedness. The same passion that fuels physical conflict also fuels legal disputes.

Whether prosecuting or defending, litigants engage because they perceive a grave injustice. Often, the parties are fighting because there's a history of rancor or the case represents a moral or financial reckoning. Such high emotionality can cloud one's thinking. When people see red, they aren't seeing the black and white.

One defense counsel observed a "very real trend of plaintiff's counsel not being willing to come off of very high numbers without regard to the merits of cases. In the last few years, I have had an excessive number of threats to walk out and 'final offers.'"

Of course, business litigants can be just as emotion-driven. As Pederson observed, in trial-bound cases, often "the defendant is either represented by bad counsel, or the defendant representative is too emotionally connected to the case to make a good business decision."

Petrofsky noted that employers "can feel defeated after a failed mediation. Sometimes, from a sense of righteousness, and sometimes because they are dreading how expensive litigation continues to be. As a defense attorney, it's important to acknowledge their frustrations and work with them to find a solution."

Counsel can get pretty hot-headed, too. Lynne S. Bassis, a mediator with ADR Services, Inc., has observed that if "pre-mediation interaction between counsel is of a scorched-earth nature, this history will pollute the negotiations. Clients will suffer. A case that should settle may not settle because of a predominance of ill will." She noted that "offering an apology to an adversary for past conduct" can result in "clearing of the air and the creation of a path toward settlement."

Three approaches to move ahead successfully

While there may be other factors which derailed your mediation, the three reasons mentioned above probably account for the bulk of what happened. Correspondingly, I suggest three ways to move ahead, navigating each obstacle.

Approach #1: Alter valuation and trial expectations

A discussion of valuation mistakes doesn't presuppose that there's an objective "right" value for a case. A case settles only if there exists a price which the defendant is willing to pay, and the plaintiff is willing to accept. The price itself varies. (Even a jury award reflects only the consensus reached among the jurors that day.)

What makes a valuation a mistake is the failure to convince the other side that the proposed valuation is factually and legally founded – that it credibly represents the ultimate risks involved. It's a tautology: a valuation isn't well-taken because the other side didn't take it well. The approach to a mistaken valuation is that expectations need to be altered – yours, theirs, or both.

Altering expectations requires first being open to change. Emerson's quote is applicable here, about foolish consistency being the hobgoblin of little minds. If you need to change your position, in light of what you've learned during or after the failed mediation, then do so!

One defense counsel attributed mis-valuation to "counsel's failure to dispassionately and fairly assess and reassess the case, including party and witness credibility." No matter why or when the assessment was mistaken, the situation can be remedied.

Robert Coviello, a mediator with ADR Services, Inc., believes that "one major hurdle to resolution is counsel's failure to manage their clients' expectations." He added, "Good lawyers not only control their own expectations, but most importantly, effectively control or condition the expectations of their clients and opposing counsel."

Don't be afraid of change, either in its own right or as to how change may reflect on you. Every case deserves to have your best efforts. Those efforts

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include evolving your position as the facts develop.

Reinglass observed that a failed mediation can cause parties to feel that "it was an important part of their resolution process, with both sides better educated . . . and gaining more ability to resolve after everyone has had time to process what they learned."

Now that you've opened your own mind, consider the possibility that the other side's expectations can be altered… with work. Be prepared to go through the steps of persuading them, which means proceeding through (more) litigation.

In Pederson's experience, cases which settled after a failed mediation "took more discovery, or an imminent trial date, to get the defendant to recognize its true exposures."

Be sure your client understands that committing to further litigation can affect the value of the case positively *or* negatively. Wagner pointed out, "The valuation may significantly change based on information learned during a deposition or through other forms of discovery."

Judge Romero provided examples: "Defendant gets *sub rosa* surreptitious surveillance of plaintiff doing things that they shouldn't be doing. Or the motion for summary judgment was denied and the judge made some comments to one side or the other that tempers their expectations. Or [plaintiffs] get a smoking gun, a former employee who left voluntarily comes forward and provides devastating evidence against defendant."

Further litigation can sometimes lead to entrenchment, Reinglass noted. It "may cement people's views when the odds are likely 50/50. The question then is, 'Which one of you is more likely to be that winning 50%? And is it worth it to throw away a chance to resolve when it may be 'all or nothing'?"

Litigation fatigue may also occur. One plaintiff's counsel noted that progressing through litigation can change the valuation because of "the client wanting to settle the case rather than continue to endure the litigation process" or the ongoing risk of damaging information coming to light.

Evaluating the risks and benefits of trial

Perhaps the most powerful way to alter expectations is to evaluate the risks and benefits of trial. Whereas trial previously seemed unlikely, a failed mediation has occurred. Trial is probably your best alternative to a negotiated agreement. What does that look like? How would you prove your claims or defenses? How might it play before a jury? How would you handle a possible appeal? Facing these uncertainties may prompt your client to find flexibility anew.

Coviello advised counsel to provide "an honest and realistic chance of success/failure at trial, together with the cost, expense, and risk of further litigation" as part of the process of evaluating and setting expectations.

Wagner noted that parties often hold inaccurate beliefs about trial. "Too often the plaintiff is convinced that having her day in court will result in a large verdict, only to get defensed. Likewise, you often hear a defendant say, 'I'd rather pay my attorney than the plaintiff,' only to end up not only paying its fees, but also a large verdict and the plaintiff's attorneys' fees."

Judge Romero observed: "Cases go to trial because one side or the other has unrealistic expectations about the merits and value or lack thereof of their case. Cases go to trial because defendants . . . offered nothing of any consequence to make it hard for the plaintiff to walk away. Or plaintiff and his/her lawyer made it easy for the defendant to try the case."

However, Judge Romero added that "unless lawyers try cases and ring the bell, they will never get top dollar in settlements. So you have to try cases and ring the bell so that the other side will take you seriously and pay more to settle rather than run the risk of a runaway verdict. On the other hand, defense counsel has to try cases, otherwise they get the reputation that they will pay in the end before trial."

Judge Romero also suggested that the mediation failure itself can alert a defendant to the fact that the plaintiff is "not afraid to take the case to trial" and has "the financial resources to do so."

One plaintiff's counsel noted that cases go to trial as "the result of having attorneys and clients who are willing to risk it. If you have a collection of non-risk averse people, your chances of going to trial are high." A failed mediation prompts analysis concerning the parties' risk tolerance.

Another plaintiff's counsel observed that cases go to trial when "liability is too questionable and defendants are willing to take the risk," and that "plaintiff goes to trial because damages are so high." If a failed mediation leads you to make that determination, it has already served an important purpose in altering expectations.

According to Reinglass, "There are cases that really need to be tried; there are also cases that absolutely should not be tried." Only you and your client can determine where your case falls on that spectrum. The discussion itself may revive the client's interest in settling.

Approach #2: Provide more information

By nature, humans fill in informational gaps with assumptions. In an adversarial process, the other side is making assumptions which don't flatter your client. The cure for ignorance is knowledge.

After a failed mediation, encourage your client to be more open. New information can be revealed in confidence to the mediator, under oath in the discovery process, or counsel-to-counsel as part of continuing discussions.

The avenue of providing new information is less important than the effort itself. Providing information is a good-faith gesture to put the parties on equal footing, clarifying the true state of the facts. If you're serious about settling at an appropriate value, transparency is required.

Wagner stated that the primary reason a case does not settle at mediation

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is because the parties lacked sufficient information to evaluate their case. In particular, she cited instances where the mediation occurred in pre-litigation or before discovery.

Of course, pre-litigation mediations can be successful. Wagner pointed out, "Many cases are ripe for resolution before a lawsuit is filed." The success of the mediation depends not on what stage of litigation the case is in, but what information has been shared.

While secrecy may seem strategic, be aware that it comes at a cost. One plaintiff's counsel shared that when mediations fail, "[i]nsufficient communication about valuation by each party leads to assumptions about settlement based on hope, and not backed up by facts." That lacuna can be addressed.

Sometimes, new information was already shared at a failed mediation, and you need only wait for the fruit to ripen. It takes time for information to make its way through the chain of command among the decision-makers. Thus, Reinglass encourages that exchange to happen both before and during the mediation. "[S]omething I am a broken record on: lawyers need to talk more to one another, be open about your points and positions, and [give] at least initial or tentative or general valuation."

One defense counsel shared that "if the valuation has gone up on the defense side, it is typically because the mediation representatives were not aware going into the mediation that they didn't have all the facts for consideration, and they need time to better understand and evaluate the new facts. Alternately, it is because they have refused to accept the risks until confronted with significant evidence and the mediation representatives now need to go back and convince others of their newly found reality and secure sufficient funds to settle the case."

Approach #3: Keep trying

Time passes, and things change. This sage life advice also applies to mediation: A failed mediation doesn't mean that mediation will not work again.

Just as emotions can preclude settlement, emotions can also inspire settlement. Negative emotions which fueled the underlying dispute, and which may have prevented a successful mediation, will evolve.

Edwards observed that sometimes, when a mediation fails, "one side or the other just needs time to process/accept the compromise the settlement will require them to make." According to Reinglass, a failed mediation "can give parties who are stuck in their positions a 'cooling off' period, a chance to reflect."

In short, time heals. Be cognizant of that and encourage your client to move through the resolution process. That way, you can be ready to capitalize on the window of opportunity for settlement when it does finally open.

There can be a sense of futility in continuing settlement discussions after a failed mediation; isn't the definition of "crazy" doing the same thing and expecting a different outcome? The key to piercing that defeatism is to recognize that most mediations *do* succeed.

Your failed mediation was an outlier, not the norm. Wagner shared that the "vast majority of my mediations settle on the first day. For those that don't, more than half settle within days or a few weeks after the mediation."

Judge Romero shared that seven out of ten cases settle at the first mediation. The remainder "will settle probably within two weeks to six months, depending on what needs to be done," such as rulings on dispositive motions. He explained that these cases usually "will resolve with my making an unsolicited mediator's proposal that will get the case settled."

Edwards observed that the "majority of cases settle the day of, but if the case needs to marinate or the defense needs time to roundtable internally or respond to a mediator's proposal, it may settle later, usually within a week or two of the mediation. Rarely have I done a second day."

Reinglass stated: "As a mediator, I have a high level of confidence that the case will resolve. In fact, I never go into any mediation without expecting it will resolve." In her estimation, as many as 90% of her cases settle on the day of mediation; others settle between one and six weeks thereafter. "The 'hard-to-move' ones might take several months," she added.

Pederson estimated that 50% of his cases do not settle the first day. However, in the last five years, "I have only had about five cases that later required a second day of mediation to settle."

Another plaintiff's counsel shared, "Approximately 60% don't settle on the first day. Of the cases that don't settle on the first day, approximately half settle in the next four to six weeks."

Patton shared, "I have done very few second days in single plaintiff cases – only three that I can think of over a long period of time. A good mediator will help you settle the case without a second day, because you have accomplished enough during the course of the first day to resolve it with a little more effort and time."

In summary, mediation typically works. The question is more *when* than *if*. Since your failed mediation, circumstances have changed. At a minimum, the failed mediation has itself changed the landscape: failure paves the way to success. You can't step into the same river twice. So, be willing to try again.

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