

TOP TEN MISTAKES ADVOCATES MAKE IN MEDIATION

A Mediator's Perspective

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1. Failing to Conduct a Litigation Risk Analysis Before the Mediation.

Too many attorneys walk into a mediation knowing their case's strengths but having never seriously considered its weaknesses. Before any mediation, counsel should ask and answer five questions: (1) What are the chances of prevailing on liability? (2) What is the realistic range of damages from high to low that a trier of fact may award? (3) What is the percentage likelihood that each of those damage scenarios will be the one awarded? (4) If the case does not settle, how much will it cost in attorneys' fees, expert fees, and other litigation costs to get this case ready for trial or arbitration? (5) Are there any other factors that will affect the settlement negotiations (e.g., business interests, leverage, collectibility)? If you haven't worked through those questions with your client before you arrive, you don't have a negotiation plan . . . you have a hope.

2. Treating the Mediation Statement as an Afterthought.

The mediation statement is your opening argument delivered in writing, and it is often the mediator's first and deepest exposure to your case. A strong, fact-based position paper, supported by page-and-line deposition cites, key documents, and relevant case law, gives the mediator the tools to be your most effective advocate in the other room. A conclusory two-page letter, or worse, sending nothing at all, forces the mediator to spend the first hour of your mediation just figuring out what the dispute is about.

3. Not Preparing the Client for Mediation as a Process Distinct from Litigation.

Clients routinely arrive at mediation expecting to "prove their case" to the mediator, as though the mediator were a judge, jury or arbitrator. Counsel must explain in advance that mediation is a negotiation, not a trial. The client needs to understand the process, the role of the mediator, the concept of caucus, the nature of compromise, and the reality that the other side has a different view of the facts. A client who has been told about the warts in the case by her own lawyer before the mediation is far more useful than one who hears about them for the first time from opposing counsel or the mediator.

4. Failing to Equip the Other Side to Evaluate the Case Before the Mediation.

Mediation is not the time for surprise. If you want the opposing party or carrier to arrive with meaningful settlement authority, they need to have received your key evidence, damages analysis, expert reports, and demand well in advance . . . two weeks at minimum and more for cases with significant damages. An adjuster who has never seen your life

care plan or damages breakdown cannot get authority from a supervisor who hasn't been briefed. Likewise, if you receive a demand, respond to it before the mediation so that both sides have a framework from which to negotiate.

5. Opening with an Extreme Number That Destroys Credibility.

An opening demand or offer that bears no relationship to the evidence or litigation risk analysis signals to the other side that, at best, you are not serious about settling or, at worst, you have no idea what you are doing. If your case on its best day is worth \$800,000 and you open at \$12 million, you have given yourself no room for an orderly progression toward a realistic number. The other side will conclude you are unreasonable or incompetent and will never show you their best number. A lowball opening offer produces the same effect in reverse. Start where you can defend your number with objective criteria, and leave yourself room to move.

6. Refusing to Participate in a Joint Session.

Joint sessions are the most underutilized tool in mediation. Lawyers reflexively decline them, often because they fear losing control of the message or triggering an emotional reaction. But a well-managed joint session gives the parties something no amount of shuttle diplomacy can replicate: the chance to hear the other side's perspective directly. In commercial cases between parties with an ongoing relationship, putting the principals in the same room can unlock creative solutions and remind people that they are there to solve a business problem, not to fight.

7. Negotiating Without a Plan for the Numbers.

Effective mediation advocacy requires more than knowing your bottom line. Before the first number is exchanged, you should have mapped out a sequence of moves — each one designed to signal to the other side where you are headed and how serious you are about getting there. Your opening number, the size of each successive move, and the pace at which you make concessions all communicate something to the other room whether you intend them to or not. Large early moves followed by progressively smaller ones tell the other side you are converging on a number. Erratic jumps — \$50,000 here, \$5,000 there, then \$75,000 — tell them you are negotiating without a plan, and they will stop trusting the process. Backing away from a prior demand or offer without explanation breeds suspicion that you were never serious about the earlier number. Brackets are a useful tool, but never propose a bracket unless you are willing to settle at or near the midpoint, because both sides will calculate that midpoint the moment they see your range. If you then refuse to go anywhere near it, you have created an expectation you cannot meet and poisoned the negotiation in the process. Every move you make is a message — make sure it is the one you intend to send.

8. Not Having the Decision-Maker Present and Engaged.

Most mediators' rules require that a person with full authority to settle attend the mediation -- and for good reason! The most frustrating moment in a mediation is reaching an agreement in principle only to learn that the person in the room doesn't have the

authority to close the deal. Mediation works best when the mediator can speak directly with the person who will ultimately say yes or no. If a person with full authority truly cannot attend, make sure opposing counsel and the mediator are aware of and agree to the limitations in advance, and ensure the person with authority is reachable by phone throughout the day. Surprise limitations on authority undermine trust and can collapse a mediation that was otherwise headed for resolution.

9. Misquoting Testimony, Holdings, or the Record.

Nothing destroys credibility faster than misrepresenting what a witness said, what a court held, or what the record shows. When the mediator carries your characterization of a deposition into the other room and opposing counsel pulls up the transcript and it says something different, your credibility is gone for the rest of the day, as well as the mediator's ability to advocate on your behalf. If you cite testimony, have the page and line. If you cite a case, have the holding right. The mediator is your messenger; don't arm the messenger with bad information.

10. Using the Mediator's Proposal as a Substitute for Negotiating.

A mediator's proposal is a last-resort tool, not a negotiation strategy. I regularly see parties spend the entire day positioning for the proposal rather than engaging in real negotiation with the other side. When a party asks me at four o'clock for a proposal and then tells me what number it should be, that's not a proposal request -- it's an offer or demand that the party wasn't willing to make directly. Your best chance of settling the case is in the room, on the day, while everyone is engaged. Don't outsource that opportunity to a post-session number unless you have to.

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