

5

Biggest Mediation Mistakes

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We all have our own style for mediation and the things that we think work. It is hard for a mediator to know what might have worked because we do not know what the parties would have done under different circumstances. But, from observation, we can often tell what does not work and what can almost guarantee a failed mediation or at very least an unhappy client. While there are many things that should be avoided, here are my top 5 (in no particular order):

1. Not Preparing Your Client for the Mediation

I recently mediated a case in which it was clear that the attorney had not explained the process to his unsophisticated client. The client thought he would give a number and the other side would either take it or not, and therefore he was ready to leave after the first round when they were far apart. It is counterproductive and not fair if you do not prepare a client for what will happen in the mediation and what your strategy will be. Remember, it is your client's case and s/he needs to understand and be involved in the process. They also need to understand and be prepared for different styles of negotiation from the other side. An unprepared client begins the mediation at a disadvantage and feels defensive and uncertain.

2. Giving Up on a Mediation Before It's Truly Over

I am a big believer that a mediation is never over as long as the parties are still at the table. It is not unusual for a mediation to appear doomed because the parties are very far apart late in the day, but we keep at it and it settles. Despite what the other side is saying, as long as they are still here and engaged, there is hope.

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3. Taking Actions That Cause You To Lose Credibility or Trustworthiness

There is a difference between shrewd and hard negotiations and being deceitful. If you make a statement or take a position about your case that the other side knows or discovers is not true, you can anger your opponent, often to the point that they no longer believe that you are negotiating on good faith. Since the goal is to try to resolve the case, you have taken a big step backward. Likewise, if you give an ultimatum but then don't mean it or stick with it, you lose credibility and it is harder to get the other side to believe you when you say you are at or close to your bottom line.

4. Not Preparing Your Case for Mediation

Some lawyers figure that since this is a voluntary, non-binding mediation, why waste time getting ready for it? This is a mistake in many ways. First, if you are not prepared it will show and the other side will feel that if you are not willing (or your client is not financially able) to spend the time now, you probably are not willing or able to try the case, so they have the upper hand. Second, if you are not fully prepared the other side can take a legal or factual position and you may not know whether it is legitimate or bogus. While you can always wait and not settle so you can look into that, you have wasted your client's time and money and maybe the momentum of the mediation. And, not insignificantly, if you are not prepared your client will undoubtedly realize that – and s/he may soon become your ex-client.

5. Insulting the Other Side in the Opening Statement

This might be a style question, but I am not talking about just being forceful, pointing out the weaknesses of their case, or making them think twice about the joy of a jury trial against a skilled litigator like you. I am talking about truly insulting the opposing party. I have seen lawyers do that on occasion and I have never seen one of those cases settle. You might honestly believe that the other side is a liar, cheat and all around evil person. But do you think s/he will suddenly realize that if you point it out in graphic detail in opening? Or do you think it is more likely that you will make the other side so mad all they will want to do is beat you in court? Most likely it is the latter. So, unless your whole reason to be at the mediation was to have the opportunity to let the opposing party hear it from you face-to-face and you never wanted to settle the case, this is not a good strategy.