The 12 fastest ways to ensure a bad result in mediation

Common pitfalls lawyers make as they navigate the mediation process

By Michael Dickstein

1. Insist on keeping everything confidential from the other side, and do not share your mediation statement with them.

***The problem*:** Many lawyers perceive information to be power, and believe that keeping information from the other side, and sometimes even from the mediator, gives them power. As a result, they shy from exchanging mediation statements, prefer to avoid joint sessions, and avoid sharing as much as possible with the other side.

***The risk*:** Although information may be power, in mediation if you do not share information, it will not help you. And because fewer than 5 percent of cases go to trial (in most jurisdictions), it makes little sense to withhold information that could drive a better deal at mediation.

***Best approach*: Keep only those things confidential which:** will make your case seem worse than the other side assumes it is; or will make your case seem better than the other side assumes it is, will be kept a surprise until trial, and will be a more valuable surprise at trial than a settlement aid at mediation.

Surprise is rarely a benefit at mediation, particularly in complex mediations: Unlike surprise at trial, surprise at mediation generally leaves the other side feeling suspicious, betrayed, concerned about what other information is being withheld, and concerned about making a decision at the mediation.

Sharing information in advance is particularly valuable when facing a party with diffuse decision-making authority: Entities that usually need lead time to be able to make a decision, include: insurance companies, government entities, large corporations with absent decision-makers, or coalitions of plaintiffs' counsel.

Sharing mediation statements with the other side: The instinct to keep your mediation statement confidential from the other side, tends to be counterproductive. The mediator needs to be able to share the information in order to convince the other side. There is no more efficient way to share voluminous information, and to have the other client hear your unfiltered arguments. And, even if the other party will not share their mediation statement, it can give you a big advantage if you share your statement, if it is persuasive.

AFTER WINNING THE STARE-DOWN CONTEST, HE KNEW THE MEDIATION WOULD GO HIS WAY.

2. Insult the other side, either purposely, inadvertently, or because you simply think they need to be told the "truth" about themselves.

***The problem*:** With a surprising frequency, counsel make statements that insult the other side. Such insults appear to be made because: 1) counsel incorrectly believe that attacking others will lead the other side to be more compromising, 2) the insults are inadvertent, or 3) counsel believe it is important to "speak the truth."

Purposeful attacks: Because attacking witnesses can work in litigation, litigators often believe the strategy will work in mediation. I have seen defense counsel attack plaintiffs as incompetent, liars, consumers of pornography, extortionists, and spouse abusers. I have seen plaintiffs' counsel attack defendants as extreme racists/sexists, fat cats, exploiters, and liars (and even lecture them on alleged subliminal sexual images in their office's abstract art).

Inadvertent attacks: Even more common than purposeful attacks, are inadvertent insults. These insults are typically unexamined truisms for one counsel, that are extremely antithetical to

the other side's beliefs (e.g., dismissing someone as a "corporate tool," or dismissing lawsuits as "legalized extortion").

"Speaking the truth"/Allocating blame: Participants in mediation sometimes feel that the other side has not had to examine his/her/its behavior, and that a mediated solution forecloses "the truth" being spoken in a public forum. As a result, they feel compelled to speak "the truth" in mediation. Parties even choose the most inflammatory way of expressing themselves, because they believe it to be truer. These parties tend to see the purpose of the mediation as one of allocating blame for the past.

***The risk*:** When a party feels attacked, the party almost always either attacks back, or withdraws. Either reaction makes it much harder to make a deal. Parties that feel unjustly attacked tend to conclude that the speaker is unreasonable, incorrectly perceives reality, and cannot be dealt with, thus seriously impeding reaching an agreement.

***Best approach*:**

Purposeful and inadvertent insults: Carefully monitor your language and statements, and make sure that the message you are conveying is the message you intend. Try to make sure that you are aware of the assumptions built into what you are saying. Do not make statements that are likely to leave the other side feeling insulted without fully considering the costs and benefits.

"Speaking the truth"/Allocating blame: While there can be a role for blame in mediation, counsel must realize that choosing blame usually comes at the cost of an otherwise better deal. In general, mediation is a process that looks forward, while blame looks backwards.

3. Don't make arguments that will be most persuasive to the opposing party; instead, make arguments that would be most persuasive to a neutral party.

***The problem*:** Counsel often make ineffective mediation arguments, either because they are only focused on convincing the mediator, or because they do not appreciate the difference between the best arguments in court, and the best arguments in mediation.

Arguing to a biased opponent, as opposed to a neutral: Some of the strongest arguments to a judge or other neutral party, will not be as persuasive to an opposing party who sees the world in a fundamentally different way than you do. It can be much easier to make progress with "weaker" arguments that are more palatable to the other side (e.g., damages or statute of limitations arguments can be less controversial than liability arguments).

Arguing without presenting evidence: Similarly, arguments that might persuade a neutral, but are backed by insufficient evidence, can actually convince opposing parties that the opposite is true (e.g., "Tell them I have a document that kills their case"). This occurs because opposing parties will usually assume that if evidence is not presented, it does not exist.

***The risk*:** The risks include failing to convince the other side, hardening them in their position, and even convincing them that the opposite of what you say is true. If you feel frustrated that your strongest arguments are being ignored, you have a strong feeling that you are right, and you are concluding that the other side is crazy, you should be alerted to the possibility that you are making arguments that would be more persuasive to a neutral.

***Best approach*:** Always remember that your goals should be: 1) to present what will be most likely to convince the other side to give you what you want, and 2) to give the mediator the ammunition to help you.

4. Fail to consider that there is probably no "they" in the other room.

***The problem*:** In private discussions, lawyers often refer to the other side, collectively, as "they." It is not uncommon to hear statements like: "they are here in bad faith to get free discovery," or "they obviously don't want to make a deal." This assumes that everyone on the other side has the same motivations.

***The risk*:** The worst danger in thinking of the other side as monolithic, is that you take positions that simply align everyone on the other side against you, give power to the most intransigent members of the opposing party, and make it impossible to achieve the deal you are seeking.

***Best approach*:** Use joint sessions, casual contacts, and the mediator to try to uncover the positions and motivations of the various lawyers, parties, and party representatives, and to find arguments that will appeal to, and give power to, those most likely to agree with you. Remember that any offer made by the other side is usually the result of internal negotiations.

5. Don't adequately prepare for the mediation

***The problem*:** Before the mediation, attorneys often fail to adequately analyze factual issues, damage scenarios, and the evidence that will be presented to support damages. Instead, they focus on legal arguments about liability. This leaves their cases sounding generic. In some cases, counsel also do not prepare adequate mediation statements and opening statements.

***The risk*:** By not being sufficiently prepared, you damage yourself in four important ways. First, you do not give the mediator sufficient ammunition to present your position forcefully. Second, you do not give the other side the impression that they will face a formidable adversary, and that it is risky not to make a deal. Third, you may miss ideas that would have allowed you to structure a better deal for yourself. Fourth, you leave yourself in a worse position to assess whether any deal on the table is worth taking.

***Best approach to mediation statements*:** Spend the time to prepare a strong, well thought out, succinct, persuasive, non-bombastic, and non-conclusory statement. Remember that mediation statements are your opportunity to

educate all members of the other side, and to speak to them in depth. Opposing parties should be left hopeful about pursuing a mediated agreement, and worried about pursuing litigation. They should not be left angry.

***Best approach to opening statements*:** Opening statements are an opportunity to show the other side that there can be a deal, and to carefully explain the risks in not settling. Opening statements are not the moment for poorly thought out, and aggressive, versions of your opening statement in court. Consider carefully: 1) your goals; 2) who you are trying to persuade, and of what; 3) what will appeal best to your various audiences (members of the opposing party, their counsel, your own client, the mediator...); 4) whether you want to focus on the deal itself, or what will happen if the other side doesn't make a deal; and 5) your use of language.

Best approach to damages: Make sure: 1) that you have obtained all information necessary to do a convincing damages analysis. [This can be particularly important in complex cases – for example, in an employment class action, it is essential to have access to sufficient employee records to do a class-wide damages analysis, not to simply rely on the named plaintiff(s).]; 2) that you have analyzed the information sufficiently; 3) that both sides understand how any damage analyses work (and you are able to argue as to why your approach is better); and 4) that you have someone at the mediation who can quickly work with alternative damage scenarios.

6. Rush to caucus, rather than take full advantage of joint sessions with the other side.

***The problem*:** Many lawyers attempt to avoid joint sessions, because they are afraid of alienating opening statements and they want to move as quickly as possible to seeing whether a deal is possible.

***The risk*:** Skipping joint sessions skips many of the major benefits of mediation. Joint sessions are a unique opportunity to size up the various players on the other side (and the differences between them), to speak directly to represented parties and key decision-makers (even if appearing not to), to set a positive tone for resolution, to assess how the other side feels about their arguments, to better understand the other side's true motivations, to look for unexpected common ground, to clear up misunderstandings and to clarify numbers-related issues (such as damages calculations). By definition, it takes twice as long to convey information through the mediator than to everyone at a joint session.

***Best approach*:** Constantly assess whether the current segment of a mediation would be best conducted in joint session or caucus. Don't assume joint sessions are nothing more than attacking opening statements. There is much that can be done together beyond traditional openings. Don't rule out all opening statements because you have had bad experiences with them before. Think about whether there is anything either side could say that would be productive. Avoid saying alienating things, and say difficult things in the least alienating way possible. Set ground rules to avoid attacking openings. Remember that avoiding saying unwelcome things, by having the mediator say them, merely transfers the other party's resentment from counsel to the mediator.

7. Focus on negotiating a monetary amount to the exclusion of everything else.

***The problem*:** Lawyers in mediation have a natural instinct to focus only on negotiating a monetary amount. However, there can be many other fertile areas for negotiation, and many other elements that can make a deal work. I have seen deals closed by including: presents for Christmas, free airline seats, a job, charitable contributions, apologies, press releases, services, products, and anything one party values more highly than the other. It is important to stress that such items do not have to be related in any way to the underlying dispute. Second, there can be additional terms to the agreement that are as important to one party as the size of any monetary payment. I have seen these include: payment terms, confidentiality terms, and terms governing how a settlement fund is distributed.

***The risk*:** By becoming solely focused on a dollar figure, and generally a dollar figure that attempts to approximate what would be awarded in court (adjusted for risk, time and expense), counsel can miss important opportunities and dangers.

***Best approach*:** In every case, counsel should consider whether there are ways to achieve the goals of their clients, or to confer benefit on any of the parties, other than by simply negotiating a monetary settlement amount. Counsel should explicitly consider whether there are approaches that do more than approximate what would happen in court.

8. Start the monetary part of a negotiation too high, or too low.

***The problem*:** Parties are often concerned that their first monetary offer be the right amount to get them the best deal possible.

***The risk*:** Plaintiffs' counsel usually consider that if they start too low they will leave money on the table, and defense counsel usually consider that if they start too high, they will end too high. These are possible risks. What fewer lawyers consider, is that the opposite is also a risk. If plaintiffs' counsel begin monetary negotiations at numbers that are far too high, they can end up with worse deals than if they had started at lower numbers. They can also end up with no deals at all. Beginning a numerical negotiation too far away from where you hope to end will usually lead the other side to begin with an equally extreme position, or to refuse to negotiate. This can mean that you will

be forced to make a series of very large concessions (which will be viewed as caving in), or face the prospect of never knowing what deal would have been possible.

***Best approach*:** Although there is no ideal number at which to begin a monetary negotiation, and many opening numbers can lead to roughly the same result, there are extremes that are generally counterproductive. It can be effective to make an aggressive first offer in a monetary negotiation, but not if that offer is perceived as unconnected to any reality. Remember that if you start farther from where you hope to end, you will have to move in larger jumps to get a deal. You will also risk never finding out what the other side would have done, because they walk away. If you are a plaintiff's counsel, remember that because of client dynamics, defense counsel never wants to have turned down a demand, and then done worse at trial. Conversely, a defense counsel's easiest day is one in which the plaintiff's final demand is higher than what defense counsel imagines could be lost at trial. Such a final demand is a guilt-free green light to litigate to the bitter end.

9. Fail to understand or don't explain to your clients that a first offer is a message, and a bracket can be more than its midpoint.

***The problem*:** No lawyer expects a first offer to be accepted. And yet they are usually analyzed as actual proposals, rather than as indications of where a negotiation could end. The same counteroffer of $100,000 means something very different in response to $7 million than to $500,000. Similarly, assuming all brackets serve the same purpose, and every bracket means its midpoint, destroys the usefulness of brackets to negotiate more quickly and transparently.

***The risk*:** Clients become incensed by first offers they perceive as extreme, while still being anchored by their own extreme opening offers. Any communication about what deal is ultimately possible, is lost in the outraged focus on why the first offer is unacceptable. With respect to brackets, assuming only the midpoint of a bracket matters, leads to calculating the midpoint of the midpoints of each side's brackets, which drives their offers apart, not together.

***Best approach*:** Explain to clients that the norm in North American mediations is to make a first offer far from where the deal will end. Thus, clients should neither get attached to their own first offers, nor be dismayed by the other parties' first offers. Instead, it is important to seek the mediator's help with conveying and understanding an offer's message as to what deal is ultimately possible. Brackets should be used and understood flexibly. They cannot be understood without knowing if they are intended to convey a low point, a midpoint, a highpoint, a solicitation to negotiate in counter-brackets, an area of overlap, an area of non-overlap, or something else.

10. Fail to ensure you have a team member who can work easily with numbers.

***The problem*:** Numerical analysis can be very important in the liability, damages, and deal negotiation aspects of a case. To effectively assess numerical arguments, it is crucial not only to understand your analysis, but also the other side's (and to have someone who can translate easily between the two). Understanding only your own numerical analysis, is like knowing enough of a foreign language to ask a question, but not enough to understand the answer.

***The risk*:** A lack of facility with numbers can leave an attorney vulnerable to someone very comfortable with numerical calculations. It can lead you to accept deals you should refuse, and refuse deals you should accept. In complex cases, *small errors in calculating damage numbers can be significantly magnified.*

***Best approach*:** Ensure that there is a lawyer on your team who can manipulate numbers with ease. Many lawyers work very badly with numbers. A lawyer who works well with numbers will perceive available options/arguments that the other side misses. Such a lawyer can avoid options and arguments that would be a problem for you, before the other side is even aware of them. If no lawyer on your team is facile with numbers, you should make sure to bring someone who is.

11. Fight over disagreements on value, rather than taking advantage of them.

***The problem*:** The parties disagree about an issue such as the future interest rate, the future value of stock, or what percent of class members will make claims in the future. Each side tries to convince the other side that they are right. The closer the parties come to an agreement on the issue, the farther they move from an overall deal. (E.g., In a dispute over stock ownership, in which you believe the future value of shares will be high, and the other side believes it will be much lower, it can be counterproductive to argue for a high value, if your client wants to end up with the shares.)

***The risk*:** Becoming so focused on winning the battle that you lose the war.

***Best approach*:** Before arguing over perceived differences with opposing counsel, make sure that the difference in perception cannot be used to facilitate a deal.

12. Always assume that just because you have done something before, the other side will be convinced to do it. Or, refuse to do something because you have not done it before.

***The problem*:** Counsel argue for doing something because that is the way they have always done it. Some counsel think the statement "I have never seen that before" should end all discussion.

***The risk*:** Just because something was done in the past, does not make it the best way to do it. More important, just because you did something before, does not convince anyone that you found the best way to do it. It is easy to get locked into less effective ways of approaching

settlement, and missing new, more effective, ideas.

***Best approach*:** Be prepared to constantly evaluate new approaches, and to weigh them against your interests and your alternatives. Do not get stuck in one paradigm. And be prepared to justify the approach you advocate in terms that will convince the other side.

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