WHAT ARE THE TOP 10 MISTAKES ATTORNEYS MAKE IN MEDIATION?
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1. NOT BEING PREPARED AND/OR NOT USING THE POSITION STATEMENT PROPERLY
Counsel needs to be ready to settle: think in advance of what your demand or offer will be and how you'll respond to the other side's position; and think of what can be accomplished through mediation.

The position statement is a useful tool to educate the mediator (and, if exchanged, the adversary) as to your views of the case and the strength of your position. However, remember that the mediator is not deciding anything. It doesn't matter who will win; it doesn't matter who is right. Rather, the mediator is trained to help the parties find common ground, to look for common interests that can be accomplished through a resolution, and to facilitate a discussion. Also use the mediation statement (that is confidential, for the mediator's eyes only) to outline obstacles to settlement, emotional or relationship issues that might not ordinarily appear in court pleadings, or other issues that can help the mediator consider and prepare in advance.

Most lawyers can't see the weaknesses of their positions – or, worse – have advised their clients that their case is so winnable that the party has little or no interest in settling. To make mediation successful, you need to think not just about the strengths of your case, but also its weaknesses, as well as the strengths of your adversary's case. The neutral mediator is there to be objective, may help you evaluate your case (depending upon the mediation style), but is not there (usually) to tell you if you are right or wrong.

Many lawyers forget to bring documents to the mediation that might help the mediator understand a position better. For example, not bringing the employment file to an employment case does not permit the mediator to review documents in it and give feedback as to their persuasiveness and value to the case.

2. ADVOCATING ISSUES – NOT THINKING INTERESTS TO BE SATISFIED IN RESOLVING A DISPUTE
Most lawyers are guilty of falling in love with their case and the positions they are taking (be it as a claimant or defendant), and with the advice they've already given to their clients.

At the mediation, you need to be prepared to hear and discuss the strengths and weaknesses of your case – and to see the weaknesses and strengths of the other side. It is these views that will help your client see what is the best alternative and what is the worst alternative to a negotiated settlement.

If you go into a mediation merely looking for the mediator to vindicate you – i.e., tell you that you are going to win – then you are missing the point of a mediation and the opportunity to fashion a creative settlement. Many lawyers complain that the mediator didn't understand that his side would prevail. Again, this demonstrates that most lawyers are not used to mediation – it is not a settlement conference with a judge where winning or losing is an important factor.

Think of what your client's interests are – and what your adversary's interests are. Is there common ground that can be found that can form the basis of a settlement?

3. NOT BRINGING THE RIGHT PERSON TO THE MEDIATION
It is important that each side send to the mediation someone with knowledge of the facts (or case) and authority to settle. Assuming you can just place a phone call to persons with the authority to pay or accept a payment, is not enough. A mediation is a process. It is therefore important that each side send a representative who has settlement authority and is familiar with the case and is in attendance throughout,

so that they are a part of the process and progress – and even see the deadlock. It is important that they be involved and show a commitment to the process. Just being a phone call away, is not going to get the job done.

Consider whether a spouse or parent or close advisor may help a party evaluate a settlement. Should an expert appraiser attend to help explain to a mediator how to properly value the interest being sold? Such a person in attendance can quickly help counsel and the party evaluate offers. If insurance money is involved, a decision maker representative of the insurer is essential.

4. NOT GETTING A SIGNED TERM SHEET AFTER A SETTLEMENT IS REACHED

In New York, oral settlements made outside of court are not enforceable. Therefore, it is imperative in order to have a binding, enforceable settlement, that the parties (and/or counsel) execute a written term sheet, memorandum of understanding or settlement agreement. Such a written, signed document (or a transcript of oral court proceedings that are on the record) can be enforced by a court.

5. NOT PREPARING THEIR CLIENT IN ADVANCE

Even the most sophisticated of business people may be unfamiliar with mediations and not have experienced such previously. Therefore, it is important to explain the process of mediation, what will happen at the mediation (joint sessions and caucuses), and the back-and-forth negotiations.

The client must understand that the mediator can be a sounding board, can help fashion offers or responses, and to help advance creative solutions. The client needs to know that the fact that anyone is making a settlement offer or a demand, is not an indication of weakness.

The client also needs to think about and obtain tax advice in advance, so as to understand the tax effect of the payment or receipt of funds.

The client should be thinking about non-economic solutions, the cost of litigation, and the likelihood of success. Such factors can help assess whether the proposals made are appropriate and can form the basis of a resolution

6. NOT CONSIDERING IN ADVANCE WHAT DEMAND TO MAKE OR RESPONSE TO GIVE

You'd be surprised how many parties come to a mediation – be they a plaintiff or defendant – and have not considered what proposals they are going to make. This makes the mediation very time-consuming, and can make the mediation ineffective.

7. NOT THINKING OF NON-MONETARY SOLUTIONS

Besides the payment of a sum certain, there are often non-monetary elements of a settlement that can help resolve a dispute. For example, an apology (oral or written) may break a logjam or help end a litigation. In employment cases, a letter of reference, or a promise that there can be an application for future hiring can give a Plaintiff a reason to end the litigation.

8. NOT THINKING OF BUSINESS SOLUTIONS

An opportunity for a future business relationship (such a sale of goods, joint venture, or jointly pitching a certain account, or entering into a consulting agreement) can help end a dispute or be a part of a resolution. In "business divorces" (such as dissolutions) splitting up assets or businesses or even splitting up customer lists, can be a basis of a settlement.

9. NOT GETTING TAX ADVICE IN ADVANCE

In considering a settlement, before you get to the mediation, you should speak with a tax advisor about the tax implications of making a payment or receiving funds, and how the funds or payment should be characterized. Many a client has been disappointed to learn that a huge part of a settlement is subject to taxation and that they may even receive a 1099 regarding it. It is also important to have the tax advisor – especially in employment cases – consider how the payment of legal fees will be treated, if part of the settlement is the payment of such fees.

Plan in advance so that there are no surprises, or delays.

10. NOT GETTING INFORMATION FROM THE OTHER SIDE IN ADVANCE OF THE MEDIATION

So often, in order to have a successful mediation, the parties need to have an exchange of information – not full-blown discovery, but enough information so that they can make an informed decision or fashion a proposal or response.

For example, if part of settlement is a buy-out of an interest, parties need enough financial information to have a business appraiser perform a valuation. If such information is not obtained through discovery before the mediation commences, an attorney should advise the mediator (or the court or clerk if mediation is directed by the court) what information needs to be exchanged in advance of the mediation, and to set a schedule for the mediation that permits requests to be propounded and responded to. Most judges will understand and provide such time, as will a mediator. It is in everyone's interest to have a successful mediation, and therefore there's every incentive to ask the mediator to have this exchanged in advance.

If a dispute is being mediated pre-suit, it may also be helpful to have the claimant explain h is or her claim, injuries and/or economic damages in advance of the mediation.

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