

# Three of the Biggest Mistakes that Lawyers Make in My Mediation Room

By Jean M. Lawler



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Three of the biggest mistakes that I see attorneys make when they're in my mediation room, whether in an office conference room or in a zoom room, tend to be the same. Simply put, they are:

1. Not having the decision maker in attendance and/or not participating in the mediation.

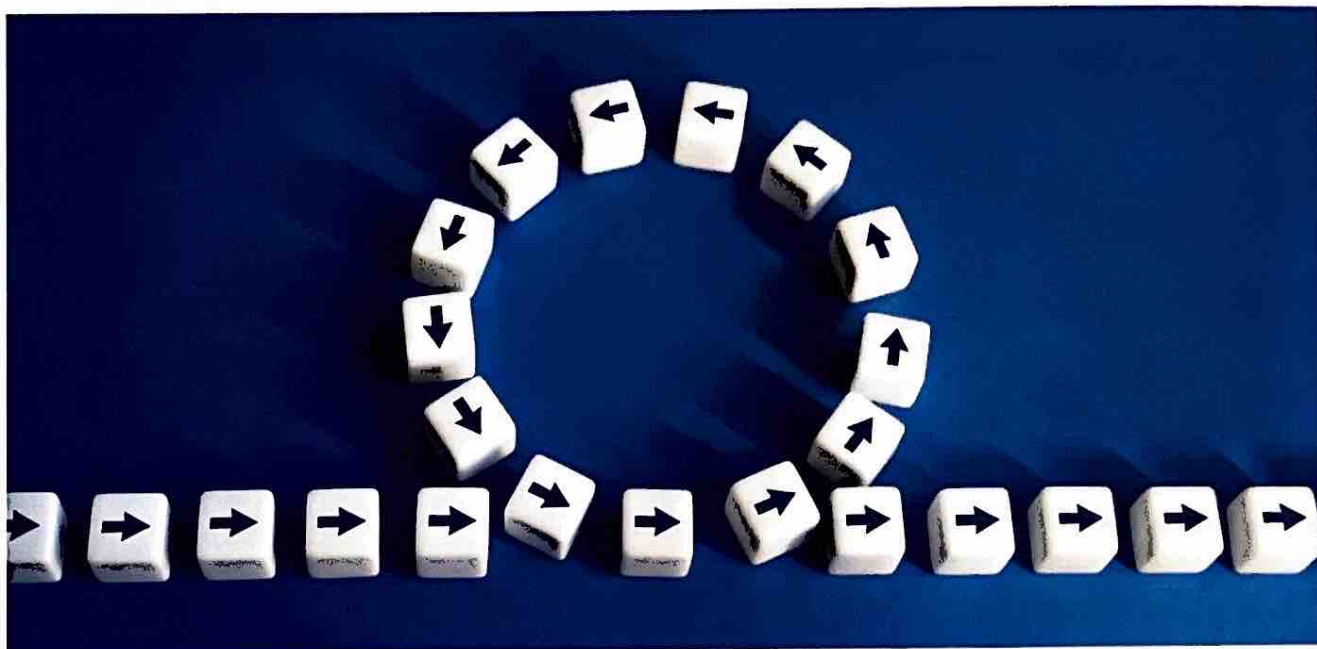
Not having the decision maker there, the one who can write the check or agree to settlement terms, can mean that the mediation is over with before it even begins. Not only can it be insulting to the other party and their attorney, but it can be detrimental for the party whose decision maker is not participating. Whether the missing person is a board member, family member, business partner or insurance claims representative, the fact that they are not present and actively participating definitely makes a difference. With Zoom and/or hybrid mediation sessions being commonplace now, there should be no reason to not have the right people 'in the room'.

2. Sacrificing strategic negotiation to the emotions of the client.

Every dispute and lawsuit triggers emotions - whether due to the issues in dispute or nuances of the involved personalities. When there are emotions at play or frustrations that boil over, they cloud one's judgement. When I see lawyers adopting their clients angst, anguish, and emotional outbursts, that tells me that the ability of those lawyers to be strategic has been compromised.

Emotions for clients are fine of course - litigation is not an easy experience. But for the lawyer who's supposed to be guiding the client, don't consciously or unconsciously adopt the emotions of the client. Nobody, including the lawyers, should be screaming at the mediator, rolling their eyes and acting out at being so disgusted with the other party that they are ready to throw in the towel. Lawyers should be counseling their clients to be calm and to not do these things. Being mindful that most cases settle, it is important that clients have lawyers who are in the frame of mind to help them get over the emotional humps so that the client can make informed decisions and have their best shot at trying to get the case settled that day or to at least set the stage for a future settlement.

## Alternative Dispute Resolution



### 3. Making (in)credible demands or offers and /or giving up too soon.

The best way to maintain credibility and reach a settlement is for demands and offers to be numbers that are not in the “insult zone” for purposes of that particular case. How to know that zone? By knowing your case, the liability and damage issues and exposures. And then negotiate accordingly. It is not impressive and hijacks precious time from the negotiations if one or both parties need to be talked down from the clouds or up from the floor, to then start having serious negotiations. As I say to parties from the outset: “Opening demands and opening offers – are never accepted. So don’t be offended.”

By the same token, giving up too soon happens more often than one might think. You have to think positively. Some lawyers think that threatening to walk out or actually walking out is a good strategy. I would say to you I don’t think that it is. Hang in there. Make the time count. Use the time you have to try and get to the best deal that you can - or at least to narrow the gulf between the last offer and last demand. If you don’t settle in mediation, you will be talking settlement again. The judge will be sure to see to that. So do your best and never give up too soon. Keep an open mind. Mediation is a process, and you can’t always shortcut it successfully.

Ultimately, be prepared. Have your client’s decision maker participate in the negotiations, counsel your client to behave with civility, don’t let a client’s emotions hijack your strategic thinking, avoid negotiating in the “insult zone”, and don’t give up too soon. Let the process work for your client. They will appreciate what a wonderful lawyer you are and will thank you for what you accomplished on their behalf.

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