The 12 Fastest Ways to Insure a Bad Result in Mediation: The Most Common Mistakes Lawyers Make.

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I SUMMARY: THE 12 FASTEST WAYS TO INSURE A BAD RESULT IN MEDIATION

1. Insisting on keeping everything confidential from the other side, avoiding opening statements, and not sharing your mediation statement with the other side.

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

3. Failing to make arguments that will be most persuasive to the opposing parties, and, instead, making arguments that would be most persuasive to a neutral party.

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

5. Failing to be adequately prepared before the mediation.

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

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

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

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10. Fighting over disagreements on value, rather than taking advantage of them.

11. Assuming that just because you have done something before, the other side will be convinced to do it. Or, failing to do something, because you have not done it before.

12. In a class action, failing to keep any claims process as simple as possible.

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II ANALYSIS: THE 12 FASTEST WAYS TO INSURE A BAD RESULT IN MEDIATION

1 Insisting on keeping everything confidential from the other side, avoiding opening statements, and not sharing your mediation statement with the other side.

A **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, prefer to avoid making opening statements, and avoid sharing as much as possible with the other side.

B **The risk:** Although information may be power, in mediations if you do not share information, it will not help you. The information that you share can be used to convince the other side that you are well prepared, that you have good arguments that can be made, and that concessions should be made to you.

i. **What about the loss of surprise at trial?:** Although it is often argued that sharing information diminishes the surprise value of the information at trial, it is very rare that the argument makes sense. First, because fewer than 5% of cases go to trial in most jurisdictions, and because the majority of cases settle at mediation, it makes no sense to organize all strategy around the fewer than 5% of cases. Second, most information that parties are trying to keep confidential eventually ends up forcibly shared through the discovery process.

C **Best approach:**

i. **Keep only those things confidential which:**

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(1) will make your case seem worse than the other side will assume it is; or

(2) 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.

ii. **Surprise is rarely a benefit at mediation, particularly in mediations of complex issues:** 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 on the day of mediation.

(1) **Advance notice is particularly valuable in complex actions, where there is an enormous amount of information to assimilate, or when facing an opponent with diffuse decision making authority:** Making your arguments and information known to the other side, in advance of the mediation of a complex action, saves significant time at the mediation. It also makes closing a deal at mediation more likely. Entities that often will not make a decision without sufficient lead time to analyze the decision include: insurance companies, government entities, large corporations with absent decision-makers, or coalitions of plaintiffs' counsels.

iii. **Sharing mediation statements with the other side:** The instinct to keep your mediation statement confidential from the other side, tends to be counterproductive. First, if mediation statements are not to be shared, but you still want to use the information in them, opening statements will have to be significantly lengthened, time will be wasted, and the other side may not have time to assimilate the information

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and change its negotiating position. Second, if the information in the statements is never to be shared, it leaves the mediator unable to use the information needed to convince the other side of your position.

(1) **What if there is information you want to share with the mediator, but feel you need to keep confidential from the other side?** Very confidential information can be submitted only to the mediator in a confidential addendum to a shared mediation statement. Confidential addendums should not be used to undermine the exchange of statements. An example of information that might sensibly be placed in a confidential addendum would include one side's assessment of the personal dynamics between counsel.

(2) **What if the other side refuses to share its mediation statement with you?** Most parties react to a refusal by the other side to share mediation statements, by refusing to share their own. This can be seen as an incentive for the other side to share, or as maintaining a balance of power with the other side. However, before responding by refusing to share your statement, you should consider whether the other side is only hurting itself. Just as in the case where one side does not produce any mediation statement at all, there is a large advantage, and it can help define the focus of the mediation, to be the only side that shares its statement with the other side.

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

A **The problem:** It may seem obvious that when negotiating you should not make statements which are sure to alienate the people

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with whom you are trying to make a deal. However, with a surprising frequency, counsel make statements that insult the other side. Such insults appear to be made either because : i) counsel incorrectly believe that attacking the other side will lead the other side to be more compromising, ii) counsel insult the other side inadvertently, or iii) counsel believe it is important to "speak the truth".

i. **Purposeful attacks:** Because attacking witnesses' character can work in litigation, litigators often believe the strategy will work in mediation. I have frequently seen defense counsel attack plaintiffs, even when they are present at the mediation, as incompetent and liars (or even as consumers of pornography). I have frequently seen class counsel attack defendants, even when they have a say in what deal will be made, as liars and extreme racists/sexists (and even lecture them on topics such as the alleged subliminal sexual and discriminatory images in their personal abstract art). Although these statements can be arguably relevant to the legal case (for instance, going to a class action's typicality, or commonality requirements, or to discriminatory animus or business justification in a discrimination suit), their benefits in the negotiation tend to be outweighed by their negative effects. And in almost every case, the same legal risks could be conveyed to the other side in a much less insulting way.

ii. **Inadvertent attacks:** Even more common than purposeful attacks, are inadvertent insults. These insults are typically made because they are consistent with counsel's world view, but extremely antithetical to the other side's view. For example, a plaintiff's counsel in a national origin discrimination case highlights that several supervisors are "southern middle aged white males." Plaintiff's counsel does so because plaintiff's counsel assumes that everyone would agree that being southern, middle-aged, white and male is evidence that someone would discriminate against foreign

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nationals. The problem is that plaintiff's counsel is trying to convince a group of people who may not believe there was any national origin discrimination, and who may be southern, middle-aged, white, or male (or may have to get buy-in from someone southern, middle-aged, white or male). Even if there are no southern, middle-aged, white or male decision-makers, skeptical listeners may perceive the list to be over-inclusive, and, therefore, a sign that plaintiff's counsel did not have enough evidence related directly to national origin.

iii. **"Speaking the truth"/ Allocating blame:** Participants in mediation often feel that the other side has never had to examine his/her/its behavior, and that by accepting a mediated solution the participant is giving up the opportunity to have "the truth" spoken in a public forum. As a result, parties often feel compelled to speak "the truth" in mediation, and do not avoid the opportunity to say things the other side will perceive as insulting. 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.

B **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, and both make it less likely that the party will make concessions. In addition, parties that feel unjustly attacked tend to conclude that the speaker is unreasonable, incorrectly perceives reality, and cannot be dealt with. Having drawn these conclusions the parties that feel unjustly attacked tend to assume that any deal offered by the party must be unreasonable, must be based on an incorrect perception of reality, and should be rejected.

C **Best approach:**

i. **Purposeful and inadvertent insults:** Carefully monitor your language and statements, and make sure that the message

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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, and carefully weigh the likelihood that the statements will be more helpful than alienating. Do not make statements that are likely to leave the other side feeling insulted without fully considering the costs and benefits.

ii. **"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 (as does litigation). Mediation is ideally suited to reaching a deal: 1) that improves the situation of the parties in the future, 2) that can guarantee parties are compensated for claims that may or may not result in compensation in the future, and 3) that includes terms dictated by the parties rather than by a court's interpretation of the law. The best mediated settlements are reached by focusing on the substance of the deal, rather than simply who will win in court, and focusing on all possible solutions, not simply the relief available in court.

3 **Failing to make arguments that will be most persuasive to the opposing party, and, instead, making arguments that would be most persuasive to a neutral party.**

A **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.

i. **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.

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For example, in a sexual harassment case, it can be next to impossible to persuade either side to concede that what "he said" or what "she said" is true(regardless of the strength of the evidence presented). It can be much easier to make progress with "weaker" arguments, that are more palatable to the other side (like arguments about the damages provided, or foreclosed, by law).

ii. **Arguing without presenting evidence:** Similarly, arguments backed by insufficient evidence, that might be considered by a neutral, can actually convince opposing parties that the opposite is true. This occurs because opposing parties will usually assume that if evidence is not presented, it does not exist. Examples of such arguments include: "My expert ran the numbers and the damages are $7,254,330, but I don't want to give them free discovery" , or "trust me, I have a witness declaration, that I can't show you, that blows their case out of the water".

B **Risks:** The risks of ignoring the difference between your best arguments to a neutral, and your best arguments to other parties include failing to convince the other side, hardening the other side in its position, and even convincing the other side that the opposite of what you say is true (see discussion above). If you feel frustrated that your strongest arguments are being ignored by the other side, 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.

C **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 are seeking, and 2) to give the mediator the ammunition to help you.

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

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A **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", "they obviously don't want to make a deal", and "they only want a confidentiality clause because they know they have done something wrong". This assumes that everyone on the other side has the same motivations. In contrast, the larger the number of lawyers, parties, and party representatives involved, the less likely this is to be true. In general you are facing a coalition of people with very different personal and, sometimes, institutional agendas.

B **Risks:** The worst danger in thinking of the other side as monolithic, is that you often 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.

C **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 **Failing to be adequately prepared before the mediation.**

A **The problem:** Before the mediation, attorneys often fail to adequately analyze factual issues, damage scenarios, and the evidence that will be presented to support damage scenarios. This is a particular problem in complex cases and class action. Sometimes the attorneys focus only on legal arguments about liability. This leaves their cases sounding generic, and makes it harder to convince experienced legal counsel, who have heard the legal arguments before, of the merits of the case. In some cases, counsel also do not present adequate mediation statements or

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prepare sufficiently for opening statements.

B **Risks:** 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.

C **Best approach:**

i. **With respect to mediation statements:** Spend the time to prepare a strong, well thought out, 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 with a feeling of deep concern about pursuing litigation, and some hope about pursuing a mediated agreement. They should not be left angry, unless necessary to the previous goals. Remember that a strong mediation statement sends both a substantive message to the other side and a process message. The substantive message usually involves the structure of the deal you are looking for, and reasons why the other side should make a deal (including why the other side faces serious risks in litigation, and why the costs of proceeding will be high for them). The process message is that they face a formidable opponent.

ii. **With respect to opening statements:** Do not simply deliver a poorly thought out, but aggressive, version 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 (various members of the

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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 (which usually focuses on litigation, but can include alluding to negative publicity, disruption in the workplace, expense, possible bankruptcy, and a variety of other issues); and 4) your use of language.

iii. **With respect to damages:** Make sure: 1) that you have obtained all information necessary to do an adequate and convincing damages analysis[1]; 2) that you have analyzed the information sufficiently; 3) that you have reached an understanding with the other side of how each of you constructed your damages analysis (you don't need to agree with the other side, you just need to know why you disagree, and be able to argue as to why your approach is better); and 4) to have someone at the mediation who can quickly work with alternative damage scenarios. Nothing can more quickly render a mediation pointless than major disagreements about the derivation of damage calculations.

6 **Rushing to caucus, rather than taking full advantage of joint sessions with the other side.**

A **The problem:** Many lawyers attempt to avoid joint sessions, including opening statements, because they are afraid that the sides will alienate each other, and because they want to move as quickly as possible to seeing whether a deal is possible.

B **The risks:**

[1]This can be particularly important in complex cases. E.g. 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). It is also important to know about any other probative information held by the other side. In wage and hour class actions, such information can include, declarations as to average estimated overtime, employee surveys, and interviews with employees.

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i. **Joint sessions:** 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 assess how the other side feels about their arguments, to better understand the other side's true interests and motivations, to look for unexpected common ground, to clear up misunderstandings and to clarify numbers related issues (such as damages calculations and claims fund distribution formulas).

ii. **Opening statements:** Skipping opening statements, particularly where mediation statements have not been exchanged, generally adds time to the mediation and undermines the mediator's ability to organize a deal.

(1) **Skipping opening statements tends to add time to the mediation:** By definition, it takes twice as long for one side to convey its arguments or information to the mediator, and then for the mediator to convey that information to the other side. Thus, skipping opening statements can seriously lengthen the time spent in mediation, or seriously reduce the information conveyed. In addition, the notion that parties can move directly to seeing whether a deal is possible, generally by putting opening offers immediately on the table, tends to be mistaken. Such an approach tends to lodge parties in their most extreme positions, which can lead to the incorrect conclusion that no deal is possible.

(2) **Skipping opening statements makes the mediator the "bad guy", and loses a neutral second opinion**

(a) In general, parties should not skip opening

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statements in order to avoid alienating the other side. There are two ways parties alienate the other side in opening statements. One is by saying things that do not need to be said (or by saying things in a way that they do not need to be said). The other is by saying things that need to be said, but will be unwelcome (usually these involve risks a party faces, or statements that need to be said for someone to move forward). In the case of things that do not need to be said, counsel need to take responsibility for not saying them (and discussing the issues in advance with the mediator, if that will help). In the case of things that do need to be said, but will nonetheless alienate the other side, it is far better for counsel to say them. In that way the mediator does not become the "bad guy", and the mediator maintains the ability to be a neutral second voice underlining the risks associated with the information.

C **Best approach:** Before skipping opening statements, or avoiding joint sessions entirely, you should be very careful to consider whether your case is one of the rare cases that merit doing so. In general, you should constantly reconsider whether the current segment of the mediation would be best conducted in joint session or caucus. And rather than deciding to avoid joint sessions or opening statements, because they will be alienating, you should focus on how to conduct yourself in the joint session without unnecessarily alienating the other side.

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

A **The problem:** Lawyers in mediation have a natural instinct to focus on negotiating a monetary amount. However, there can be many

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other fertile areas for negotiation, and many other elements to a deal. First, there can be items added to the deal in addition to the straight payment of money. I have seen such items include: multiple DVD players given right before Christmas (to a party who had failed to shop), expensive machinery, free airline seats, a job, charitable contributions, apologies, press releases, exchange of services, purchase of products, and anything else 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.

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

C **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 also consider whether there are other ways to make a deal than solely based on an approximation of what would happen in court (always keeping in mind that to accept any settlement it should be better than what would be expected to happen if the parties proceeded to court, and, in a class action, should be likely to be approved in the fairness hearing). Finally, counsel should carefully consider what other issues need to be addressed, and in what order they should be addressed (e.g. in a class action, it is difficult to assess the value of a fund offered, unless one knows whether it is offered on a claims-made or non-reverting basis, and unless one can estimate the likely percentage of possible claims that will be made).

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

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The 12 Fastest Ways to Insure a Bad Result in Mediation: The Most Common Mistakes Lawyers Make

A **The problem:** With respect to any monetary or other numerical negotiation, parties are often concerned that their first offer be the right amount to allow them to end up where they would like to settle.

B **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 true. For example, 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. It is essential to consider that 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. Thus, there are risks to starting either far too low or far too high.

C **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 raise risks that are not usually worth taking. There is no doubt that 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. Thus, always consider that if you start farther from where you hope to end up, you will have to move in larger jumps to get where you wanted to end. In addition, you will risk never finding out if the other side would have reached where you hope to end up, because they walk away. If you are a plaintiff's counsel, it is essential to remember that because of client dynamics, defense counsel never wants to be in the position of having turned down a demand and then done worse at trial. Conversely, a defense counsel's easiest day is one in which a plaintiff's counsel's final demand is higher

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than the maximum amount which defense counsel is concerned could possibly be lost at trial. Such a final demand is a guilt free green light to litigate to the bitter end. Similarly, defense counsel should consider that a plaintiff's decision to continue litigating is almost certain where the money offered to plaintiff does not seem significant to the plaintiff and the plaintiff does not have to pay ongoing attorneys' fees.

9 **Failing to insure that there is someone on your team who can work easily with numbers.**

A **The problem:** Numerical analysis can be very important in the damages, deal negotiation, and liability aspects of many cases. To assess damages, it is crucial not only to have someone available who understands your own damage analysis, but also someone who understands the other side's analysis (and who can manipulate both sides' numbers). Understanding only your own damage analysis, is like knowing enough of a foreign language to ask a question, but not enough to understand the answer. To negotiate the best deal, it is essential to be able to argue for your settlement numbers, argue from the other sides' numbers, and to create various third possibilities. And, in many cases, to prove liability, a statistical or technical analysis can be essential.

B **Risks**: In all cases, a lack of facility with numbers can leave an attorney vulnerable when dealing with someone very comfortable with numerical calculations. Failing to understand the numbers can lead you to accept deals you should refuse, and refuse deals you should accept. This is a particular problem in complex cases, where small errors in calculating damage numbers can be significantly magnified. In fact, small handicaps in dealing with numbers, that may not be that noticeable in simpler cases, can become significant impairments in complex cases.

C **Best approach:** Insure that there is a lawyer on your team who can manipulate numbers with an easy facility. Many lawyers work very

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badly with numbers. Having a lawyer on your team who works well with numbers allows you to perceive available options/arguments that the other side misses. It also allows you to avoid options and arguments that would be a problem for you, before the other side is aware of them.

i. **Lawyers vs. experts:** It is better to have a lawyer on the team who can manipulate numbers, than to bring an expert, because consulting the expert immediately alerts the other side to a numbers issue. Also, a lawyer usually has a broader overview of the case than an expert, and a lawyer who deals easily with numbers makes the legal team seem more challenging to the other side. If no lawyer on your team is facile with numbers, you should make sure to bring someone who is.

10 **Fighting over disagreements on value, rather than taking advantage of them.**

A **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 wrong. The closer the parties come to an agreement on the issue, the farther they move from an overall deal.

i. **E.g. 1:** In a dispute between the founders of a closely-held corporation, one founder believes company shares will be worth $200 per share in one year, while the other founder believes they will be worth $20. It is astonishing how often one will find the two founders trying to convince each other of the validity of their estimates, rather than simply having the person who values the shares at $200 take them for something over $20. Usually there is a moment when one or both parties suddenly realize that they are arguing against their own self-interests, but by then it is often too late to make

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the best deal.

ii. **E.g. 2:** In a wage and hour class action, in which defense counsel has insisted that there are few dissatisfied employees, and class counsel has asserted that there are many dissatisfied class members, it is generally counter-productive to try to convince the opposing side that they are wrong. Defense counsel can be more easily convinced to accept a higher total amount of compensation, the lower they believe the claims rate will be. If class counsel convinces defense counsel that the claims rate will be higher, defense counsel will offer a smaller total amount.

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

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

11 **Assuming that just because you have done something before, the other side will be convinced to do it. Or, failing to do something, because you haven't done it before.**

A **The problem:** Counsel often take the position that a settlement must be done a certain way, because that is the way they have always done it before. Similarly, some counsel think the statement "I have never seen that before" should end all discussion.

B **The risks:** Just because something has been done a certain way in the past, does not necessarily make it the best way to do it. More important, just because you have done something before, does not make it convincing to the other side that you have found the best way to do it. Particularly for counsel who have handled many mediations, it is easy to get locked into a less effective way of approaching settlement. In addition, there is the risk that new, more effective ideas, will be ignored.

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

12 **In a class action, failing to keep the claims process as simple as possible.**

A **The problem:** Both class counsel and defense counsel often have the urge to replicate the litigation process in creating a claims process. The tendency of lawyers to be comfortable with the litigation process, and to see each of its requirements as necessary procedural safeguards, leads to claims procedures that look like the litigation they sought to settle. In addition, defendants tend to take very seriously the possibility of fraudulent claims, and tend to be so eager to weed them out, that they can create claims processes that increase total expenses without significantly diminishing the claim amounts they end up paying.

B **Risks:** Nothing wastes time and money after settlement, with little gain to the class or company, like a too complicated claims process. A complex process can significantly delay payments to class members. In addition, counsel can become embroiled in complex tax, class membership, parity, and other disputes that can lead to difficult ethical issues. Finally, depending on how class counsel are compensated, class counsel can end up with significant uncompensated obligations.

C **Best approach:** A streamlined process can be far better than a theoretically perfect process. Approximations can be far better than precise calculations, when it comes to dividing a fixed pot of money. And, overall, justice, efficiency and equity are often better served by a simple process that avoids pointless battles.

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