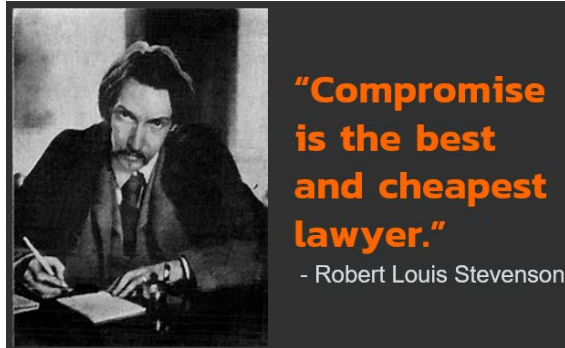




10 Biggest Mistakes Construction Lawyers (and their clients) Make at Mediation

1: FAIL TO COMPROMISE



who has not done a quality analysis of both the specific support for a specific damage item, and/or has not put the number into the context of amounts drawn/paid/owed. **We kill every bit as much time chasing numbers as we do dealing with scope and quality of work.** I won't even list anything else – fix that and most cases get resolved.” (emphasis added)

- Dean Kilgore, Austin

2: MEDIATE TOO EARLY

7 Early Mediation Red Flags

1. Lawyers (and clients) too invested in the success of their position
2. Not enough discovery
3. Expert reports and testimony not developed and evaluated
4. Lawyers not informed enough to advise clients of their position's weaknesses
5. Adjusters not well informed – not enough reporting to justify a higher reserve
6. Strengths and weaknesses in Plaintiff's damage model not developed or known
7. All parties not involved

3: DAMAGES

Chasing Numbers

“I hate it when a party comes and doesn't have their own numbers tied down – either a plaintiff or defendant

Damage Model Issues

Refusal to acknowledge “no brainer” **credits** and **offsets**.

“A party seeking affirmative relief failing to present a **well thought out, logical** and **supportable** damage model.”

- Bill Sommers, San Antonio

4: MEDIATE TOO LATE

5 Late Mediation Red Flags

1. “Tail wags the dog” – too much money spent on lawyers, costs, and experts
2. Focused on winning vs. resolving
3. Polar opposite expert positions and each party thinks theirs is the “best one in the case”
4. No candid assessment of client's weaknesses by their lawyers
5. Adjusters too invested in earlier assessments to justify a higher reserve



5: CLIENT'S BEST INTEREST

Lawyers focus too much on the law of the case instead of **what the client really wants or needs**. In other words, not focusing on the interests of the client.

The facts and law may well be in the clients favor and would normally mean the client should not take a "lower" settlement, or pay more than its worth on the other side. But, most clients, at least the smaller to medium sized ones, will be hurt much more by the **cost of the ride**.

In the majority of cases, the clients would be better off taking a "bad" settlement and getting closure, than not settling and paying for the cost of going forward, in terms of both money and time. **Lawyers need to look past the legal valuation of the case and find out what the client's real interests are.**

- Rick Flake, Houston

6: BATTLE OF THE EXPERTS

The Other Hired Guns

Contractor: *"I had no idea I was financially hurt that bad until I saw the expert report."*

Clients' absolute belief in all things espoused by the hired expert is a big problem. Experts are hired for a reason – to make the absolute best case they can for the client who hired them. If both sides believe their expert without question, compromise is a near impossibility.

Lawyers should counsel their clients up front to take the expert reports with a grain of salt.

This applies to insurance defense lawyers as well – the expert for one of the defendants in the [Ocean Tower case](#) actually said that the building was still in tolerance and could be completed and used without a problem!

7: MEDIATOR'S PROPOSAL

Never Accepting the Mediator's Proposal

Some lawyers have a reputation for never accepting the mediator's proposal.

That reputation follows you and the result is:

- Opposing lawyers will rarely give you a good settlement number
- Mediators know your reputation

That reputation stays with you and is very hard to shed. In the long run, it does a disservice to your clients.

8: INSURANCE ADJUSTERS

Need Documentation

Adjusters will not pay "big" money (and sometimes any money) without significant paper in their file: expert reports, reporting and recommendations from defense counsel.

If neither of those are in the file, expect nuisance value offers only. Hence, it's important to not mediate too early on those cases. The file needs to be



prepared, and the reserves have to be set before money will flow.

Indemnity and Additional Insured Matters

Multi party insurance cases rarely settle unless the indemnity and additional insured matters have been vetted, or at least teed up in a significant way.

Nothing is worse than a mediation where plaintiffs make the first demand, and then the mediator spends the rest of the day trying to work through the indemnity issues and “who is paying what.”

Defense Only Mediation?

Consider a defense only mediation to get those issues on the defense side off the table worked up, if not entirely settled.

9: ATTENDANCE

People Problems

- Not bringing the decision maker

- Not bringing the project manager or superintendent with the most knowledge
- Parties don't bring key documentation
- Insurance adjuster not there
- Early flight home
- Partner that does not know the file vs. associate who does

10: PERSONALITIES

Personality Problems

- Lack of situational awareness of both parties and counsel
- Lack of preparedness of a party for the process
- Refusing to listen to the opposite party's position
- Reacting to someone else's number and, therefore, being stuck reacting to the counterpart, rather than executing your own plan
- Negotiating incompletely during the day – waiting until the end of the day to discuss confidentiality, release of AI obligations, special conditions, etc.

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