



What Works, What Doesn't: What Mediators Want You To Know - A View From the Fence

***2011 WINDSTORM INSURANCE CONFERENCE
HOUSTON, TEXAS***

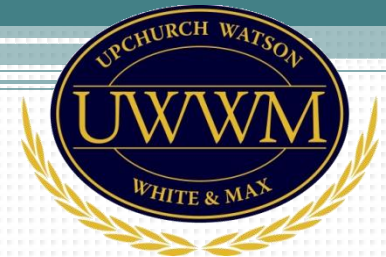
January 24 – 27, 2011

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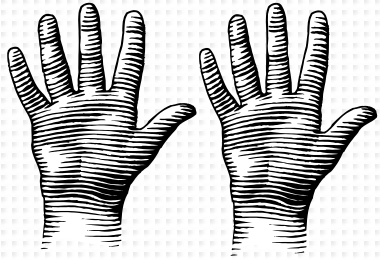
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HOW TO DOOM A MEDIATION

A TOP TEN LIST

Ten...Count them...Ten things to NOT DO!





#10

Failing to prepare the client and/or decision-maker for mediation.

✓ Participants should be prepared for the process itself.

Evaluations and strategies should be sufficiently flexible to be responsive to the opportunities created by mediation; but there is no substitute for a thorough knowledge and understanding of the strengths and weaknesses of your case as well as that of your opponent.



#9

Failing to prepare your adversary for mediation.

- ✓ Ineffective use of critical evidence
- ✓ Untimely exchange of information or mediation summaries
- ✓ Use of Consultants and Expert Reports
- ✓ Use of Demonstrative Evidence
- ✓ Use of Damage documentation
*(summaries, estimates, invoices, contracts,
proposals; bids, etc.)*
- ✓ Withholding information, inadvertently, or as a strategy
(particularly numbers)



#8

Failing to involve the mediator in pre-mediation preparation.

- ✓ Requesting assistance in scheduling and preparing for mediation
- ✓ Facilitating an exchange of information in advance of mediation
- ✓ Preparing the mediator in advance for party or issue dynamics likely to affect the process or outcome
- ✓ Prepare the mediator in advance if detailed knowledge of the dispute is required
(i.e. coverage, estimates, expert reports)
- ✓ In complex or multi-party litigation, identifying the issues, participants, and decision-makers



#7

Failing to consider your audience.

- ✓ Know your adversaries
- ✓ Design an Opening with the intent to persuade not offend
- ✓ Coordinate to the extent possible with co-parties and counsel to avoid repetition and divisiveness
- ✓ When in doubt, share your thoughts and ideas with the mediator who has the benefit of being in both rooms
- ✓ Plan your preparation
- ✓ Understand the role of the participants and their representatives
- ✓ Identify the decision-maker
- ✓ Identify the issues that will influence the decision-maker



#6

Ineffective use of posturing.

- ✓ The “line in the sand”
- ✓ Following the lead of the least effective evaluator
- ✓ The use of absolute terms



#5

Absence of the Decision-Maker.

- ✓ Ensure participation by a decision-maker
- ✓ Lack of authority
- ✓ “Phoning Home”



#4

Offensive or unethical practices.

✓ Offensive or unethical practices, demeaning to the participants and the profession, including intimidation, dishonesty, lack of candor, or an agenda incompatible with the purpose of mediation



#3

Reactive negotiation.

✓ Reacting to the tactics of your adversary thereby allowing your adversary to control the negotiation rather than advancing your own agenda



#2

Imposing unilateral conditions on mediation.

- ✓ Insisting on use of a particular mediator or rejecting mediators suggested by your adversary
- ✓ Insisting upon a specific location, time limitations, participants, etc., without good reason



#1

Lack of preparation and planning as part of the mediation process.

✓ Mediation should involve the same level of planning and preparation that goes into any other method of dispute resolution. This is particularly important because mediation is the only method of dispute resolution in which the parties can control the outcome, rather than simply being bound by it

HOW TO DOOM A MEDIATION

RECAP OF THE TOP TEN LIST

- 1) *Failing to prepare the client and/or decision-maker for mediation.*
- 2) *Failing to prepare your adversary for mediation.*
- 3) *Failing to involve the mediator in pre-mediation preparation.*
- 4) *Failing to consider your audience.*
- 5) *Ineffective use of posturing.*
- 6) *Absence of the Decision-Maker.*
- 7) *Offensive or unethical practices.*
- 8) *Reactive negotiation.*
- 9) *Imposing unilateral conditions on mediation.*
- 10) *Lack of preparation and planning as part of the mediation process.*

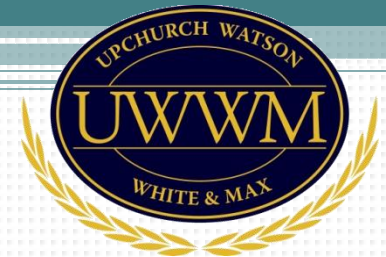


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