

CIVIL NEGOTIATION AND MEDIATION  
*PRESENTS*

“WINNING” AT MEDIATION:

# 7 Mistakes Really Good Negotiators Make



By  
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## So I had this idea . . .



. . . to study negotiation texts and evaluate mediations I've conducted as a mediator and those I've attended representing a party, with the intent of identifying negotiation mistakes.

I've uncovered seven mistakes that really good negotiators make. Not only have I seen these mistakes play out in front of me as a mediator, I've committed all of them myself as an advocate. (Some, unfortunately, more than once.)

I decided to publish this pamphlet to present them in one place, on the theory that it's always better to learn from someone else's mistakes. I hope you find it useful.

I blog weekly on the topics of negotiation and mediation at [www.civilnegotiation.com](http://www.civilnegotiation.com). Stop by and leave a comment.

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## Mistake #1: Not Developing A Game Plan



As a lawyer, I used to think that I could attend a mediation and rely solely on my instincts to negotiate. Prior to the mediation, I'd evaluate the case and decide upon an opening demand/offer. I would go in to the mediation armed only with my first number and the number beyond which I wouldn't move.

As you might expect, every single book on negotiation argues against this. Here are just two of dozens:

Thompson, *The Heart and Mind of the Negotiator*:

"Excellent negotiators do not rely on intuition; rather, they are deliberate planners."

Fisher and Shapiro, *Beyond Reason*:

"Getting to know a case file . . . does little to prepare a negotiator for how to establish an effective mediation process, how to learn each side's interests, and how to deal with each side's emotions."

Of course. It makes perfect sense. I've never walked into depositions or hearings or trials thinking I'd just wing it. I've discovered as a mediator that I wasn't alone in my negotiation hubris: many lawyers don't take the time to develop a mediation game plan.

The game plan works because you are (and feel) more prepared. Counter-offers are not considered in a vacuum. You can react more purposefully and less emotionally.

## Mistake #2: Selling, Not Listening



Lawyers are taught to be message deliverers.

We are not taught to listen.

Yet the social science of persuasion teaches us that when we have first listened to another person, we're more likely to persuade that person when it's our turn to talk.

I know, I know. It's hard to give up the belief that you are the smartest person in the room. But as a physician who had been trained in active listening once said, "I discovered it's better to listen than to be smart."

Here are three (of many) potential advantages to listening:

- You might learn something. Larry King, the recently retired talk show host: "I never learned anything when I was talking."

- You set the stage for having the other side listen to you. Stephen Covey, author of *The 7 Habits of Highly Effective People*: "Seek first to understand, then to be understood."

- You might capture a verbal leak. More frequently than you would expect, the other side will say something against their interests while they are talking.

Even where there is no joint session, listening during small talk can reap rewards.

Try these three listening skills:

- Give your full attention. Be fully present.
- Suspend your judgment. Don't argue mentally against what the other side says. Just listen.
- Check to make sure you understood by giving a quick summary, and then asking if you understood what they said correctly.

Try this change in approach at your next mediation. Rather than going in trying to sell your position to the other side, go in with a plan of being curious and trying to learn something from the other side. If you take the time to listen, you might hear something that will either help you settle or give you a winning argument at trial.

## Mistake #3: Ignoring Emotions



If you think I'm talking about your clients' emotions . . . you'd be half right. Let's start with you.

Emotions often flare when lawyers negotiate for their clients. How many times have you been frustrated when the other side hasn't moved as much as you expected, especially when you just made an impressive move? How many times have you entertained the anxious thought that a case you really wanted to settle is going to go to trial?

We can train ourselves to lessen the impact of emotions in mediations. Here are some skills to combat emotional reactivity in negotiation:

- Preparation. Strong negative emotions come up in almost every mediation. Prepare for them by reminding yourself ahead of time that you are likely to experience them and have strategies in mind to deal with them.
- Pay attention during the mediation. The sooner you notice negative emotions arising, the less sway they may have.

- Name them. *Oh, I'm beginning to feel frustrated because the negotiation is not going the way I had anticipated....* The mere naming of the emotion will lessen its duration and its impact on you.

- Take a couple of deep breaths: give the emotion time to dissipate.

- Try to be a fly on the wall, looking at the tableau, as opposed to being in the thick of it.

- Take a break if you need it. Get up and walk around. Even around the block, if necessary.

Now you're ready to begin anew, able to access the brilliant strategies that make you the successful negotiator that you are.

Use these strategies to help your clients, too. Prepare them for the emotional roller coaster. Pay attention to their emotional states during the mediation. Help your clients work through their emotions rather than ignoring them. They'll be better decision makers, too.



## Mistake #4: Shortening Up Too Soon



If there's one thing mediators hate to see, it's parties shortening up too soon, either leaving the table when the other side was willing to pay more, or walking away with additional money left to offer. In other words, stopping prematurely when a better deal that could have (and probably should have) been made.

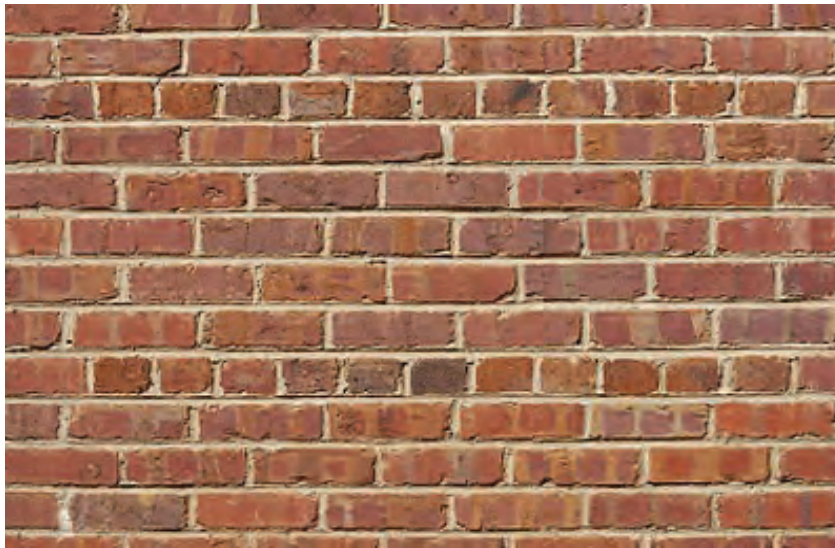
What motivates negotiators to shorten up? Reactivity is the main cause, but the reasons vary. Reactivity can be caused by physical conditions: fatigue, low blood sugar, or lack of physical movement. If this is the case, get up and move around, take a break, get something to eat.

More often than not, though, reactivity is driven by emotion. The emotions can be anger, frustration, anxiety, panic, a sense of unfairness, defiance, fear, dread, etc. Strong negative emotions can cause our amygdala, which triggers the flight-fight-freeze reactions, to engage. When this happens, we are unable to access our higher, rational brain functions. Thus, to be a really good negotiator, you need to get out of the amygdala and into the rational brain as quickly as possible. The strategies in #3 will help.

Once your client (or you) has returned to rational thought, make an effort to think positively. Studies show that negotiators who enter a negotiation in a positive mood do better throughout. It stands to reason then, that if you feel yourself turning negative, reminding and encouraging yourself to stay positive will have the same beneficial effect.

Finally, engage in some reality testing. Re-visit your WATNA (Worst Alternative To a Negotiated Settlement), which in the litigation context, is the likely verdict at trial. If you literally don't want to go there, then remind yourself that you need to settle the case!

## Mistake #5: Thinking Impasse is *Their* Problem



Impasse: like running into a brick wall. It's self-defeating to think of impasse as the other side's problem. If you want the case settled, it's your problem, too.

Harvard Business School professors Deepak Malhotra and Max Bazerman in *Negotiation Genius* suggest keeping your head in the game. Try to understand the other side's underlying problem and then be creative. If you can think of ways to solve the other side's problem, you've solved your problem as well.

Start by asking questions, because otherwise, you are just acting on your own assumptions. Who is the impediment to settlement: the other party or the other party's lawyer? Why have they stopped negotiating? Is there an interest of theirs you could meet without giving up something in return? You may come up with a solution to their problem that does not require additional concessions from you. Perhaps you can trade something without compromising. Not every negotiation has to end with a clear winner and a clear loser.

You may also want to re-analyze your position. Are you being too optimistic about your chances at trial?

Leigh Thompson, professor at the Kellogg School of Management at Northwestern University and author of *The Mind and Heart of the Negotiator*, counsels us to beware of the "overconfidence effect," which refers to:

"unwarranted levels of confidence in people's judgment of their abilities and the occurrence of positive events [like winning at trial] and underestimates of the likelihood of negative events [like losing at trial]."

She refers to studies showing that in final-offer arbitration, as in salary negotiations in professional sports, where the parties each give their final bid to a neutral arbitrator, both sides estimate that the neutral will choose their bid more than 50% of the time. Needless to say, the math doesn't work.

You can also re-analyze the negotiation. Did something come up during the mediation that suggests you should re-evaluate your case, or at least tweak your evaluation? Take a breather and look at your evaluation again before you walk away from the negotiating table.



## Mistake #6: Stopping at Their No



If the other side says, “No,” and you pack your briefcase and leave the mediation, you’ve actually made two mistakes. First, you’ve acted on your own assumption, without checking whether it’s valid or not, that their “No” really meant “No.” Second, you’ve lost an opportunity to learn something about the other side that could either help you settle the case or give you an insight into how to try it.

So first you need to find out if “No” really means “No,” which requires asking diagnostic questions. These could include:

- Why not?
- How could we have approached this differently?
- What would it have taken for us to reach an agreement?
- If you could put together a package deal, what would it look like?
- What can we do to make that happen?

You can also challenge their “No.” Propose a different number. Propose a different package. Propose additional limited discovery to narrow or define the issues.

Malhotra and Bazerman point out in *Negotiation Genius* that it’s O.K. not to reach a deal, as long as the reason is that the two parties’ views of the settlement value were so far apart there was no way that they could intersect. You won’t know that unless you ask questions about their “No.”

If it turns out that their “No” really does mean “No,” use the services of your mediator to see if the issues can be narrowed or segments of the case can be mediated. As Yogi Berra famously put it:

“It ain’t over ‘til it’s over.”

## Mistake #7: Losing the Momentum



Let's assume you've tested the other side and discovered that their "No" really does mean "No." They have stopped short of your settlement range and you're returning to your office without a settlement. What do you do now?

You could assume that the case will never settle and get ready for trial. Or, you could:

- Recognize the anger and frustration that failure to settle causes
- Take a deep breath and start thinking rationally again
- Step back and look at the negotiation as a whole from a distance
- Use fresh eyes: start from the beginning and re-think the entire negotiation
- Ask, why did the other side stop? Look at the negotiation from their perspective.
- Brainstorm: What does the other side need? What can I give the other side that does not cost my client as much as it benefits the opposing party?
- Discuss the negotiation moves with a negotiation consultant, colleague or your client

Then, review your BATNA (Best Alternative To a Negotiated Agreement). If you really, really don't want to try this case, you're going to have to consider a different settlement figure. Be flexible and willing to adjust.

Think of additional information you need or the other side needs to settle the case, and get it.

Even if you get nowhere with all of these approaches, remember, "It ain't over 'til it's over."

And, keep the mediator in the game. Most mediators want to help you resolve cases and will continue to work with you even after the mediation is over. Enlist their help in approaching the other side or considering a different approach. Keep the momentum for settlement going.

## Meet the Mediator: Nancy E. Hudgins



I'm a San Francisco-based mediator and lawyer. I began specializing in civil litigation in the 1970's, representing both plaintiffs and defendants, chiefly in personal injury, medical malpractice, elder abuse and product liability lawsuits, but also in a wide variety of complex litigation, including civil rights, fraud and class actions. I have settled and mediated thousands of cases. I have tried dozens of jury trials.

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