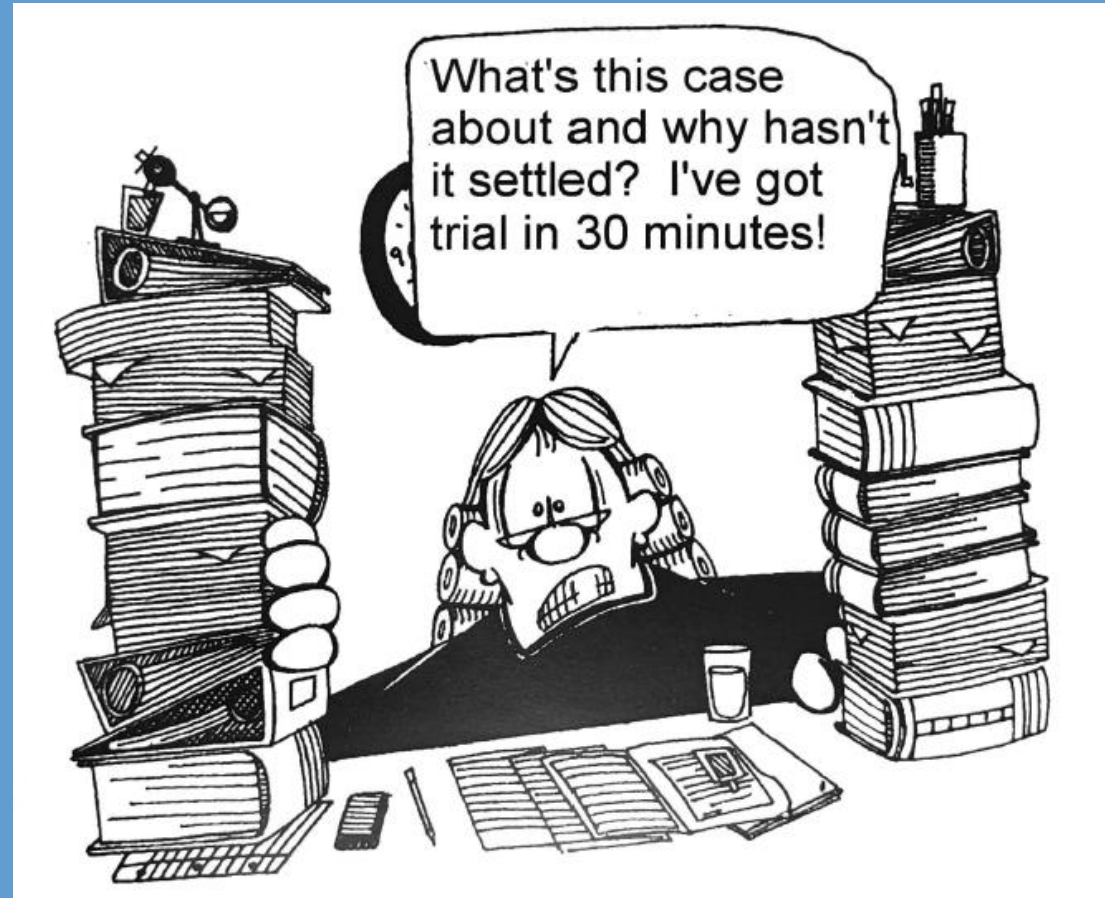


MEDITATION: An Insider's Guide To Better Mediation Results

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1. “Lets Let the Judge Do It – It Won’t Cost Us Anything”



1. Mistake:

Lawyers don't spend enough time thinking about what type of mediator they want

Recommendation:

- Pick the best mediator for your specific case
- Generally you get what you pay for (Judges, ProTem's)
- Not all mediators are the same – areas of speciality
- Every mediator has a style – know what it is (evaluator, facilitator, etc...)

- Sometimes a black robe is what you need
- Generally you get what you pay for (Judges + ProTem's v. Experienced paid mediations)
- Analyze what type of mediator you need for your specific case (plaintiff attorney, defense attorney, judge)

2. “It’s Only a Negotiation – I’m Not Going to Spend a Lot of Time Preparing”



2. Mistake:

Lawyers Treat Mediation as an After Thought

Recommendation:

- Preparation is the key to success in mediation
- First impressions with mediators are important (which memo gets read first)
- Submit your mediation statement early – give the mediator time to analyze it.

- Mediators are human – they can be swayed
- Mediators may give the parties an opportunity to speak – take advantage of this and know what you are going to say – talk to the plaintiff
- Prepare your clients for mediation
- You can't convince a mediator if you don't know your case
- Don't wait until the mediation to get information you need to properly evaluate the case
- Give the mediator all of the critical information so he/she fully understands the case

3. “This Is How I Always Settle Cases”



3. Mistake: Lawyers Treat Every Mediation The Same

Recommendation:

- There is no formula for success in mediation – be **creative**
- Consider a pre-mediation caucus in complicated cases (construction – insurance issues; multi-defendant cases)
- Ask plaintiff to make a pre-mediation demand and presentation well before the mediation

- Do verdict research
- Bring an expert witness (doctor)
- Bring a structured settlement person and several proposals
- Consider non-monetary issues (An apology, a change in procedures)
- Talk to the mediator before the mediation and give them enough time to figure out how to address difficult issues or to ask the mediator to get you information you need

4. “All They Are Interested In Is Money”



4. Mistake:

Lawyers Assume All Claimants Are Interested In
Is Money

Recommendation:

- Learn to identify the other side's true agenda – its not always about money
- Defendant's can pay less by:
 - Apologizing
 - Accepting responsibility (A simple admission at the outset)

- Promising to implement new safety procedures to prevent same accident from happening in the future
 - If you want settlement to be confidential – ask for it up front (the longer you wait the more it will cost you)
 - Set up a scholarship
 - Make a donation
 - Create a memorial
 - Buy back a defective product or home
- Talk to plaintiff's counsel before the mediation

5. “The Mediator Is My Friend... I can Tell Him Anything”



5. Mistake:

Lawyers Give The Mediator Too Much Information

Recommendation:

- Control the information you give to the mediator
- A mediator's job is to settle your case
- Mediators, like lawyers, have ego's – settlement is success, not settling is failure

- Recognize that mediators will look for every edge to settle the case
 - Mediators read clients reactions when settlement offers are conveyed
 - Mediators observe how clients and lawyers interact
- If your client is not prepared for the mediation he/she may say something that will give the mediator ammunition to use against you

6. "I Know How to Evaluate a Case. This is What The Case is Worth."



6. Mistake:

Lawyers Fail to Get the Right Information Before Mediation

Recommendation:

- Get prepared before the mediation
- Make sure the decision makers get all of the information they need before the mediation (i.e., new treatment, liens, medical bills)

- Solicit a demand before mediation
 - Use the offer to mediate as bargaining chip before the actual mediation to get the information you need
- Resolve insurance coverage issues before mediation

7. “It’s Just Mediation, I Don’t Think He Needs to Be Here”



7. Mistake:

Lawyers Fail To Have the Right Person(s) Available for the Mediation

Recommendation:

- Make sure all indispensable person's are at the mediation
- General Rule - Make sure the plaintiff is present
- Insist on the adjuster participating

- Make sure if adjuster has limited authority that supervisor is at least available telephonically
- If there are liens – negotiate in advance or have lien holders available telephonically
- Sometimes your insured **SHOULD ATTEND** the mediation (coverage issues, excess exposure)

8. “Mediator’s Remember”



8. Mistake:

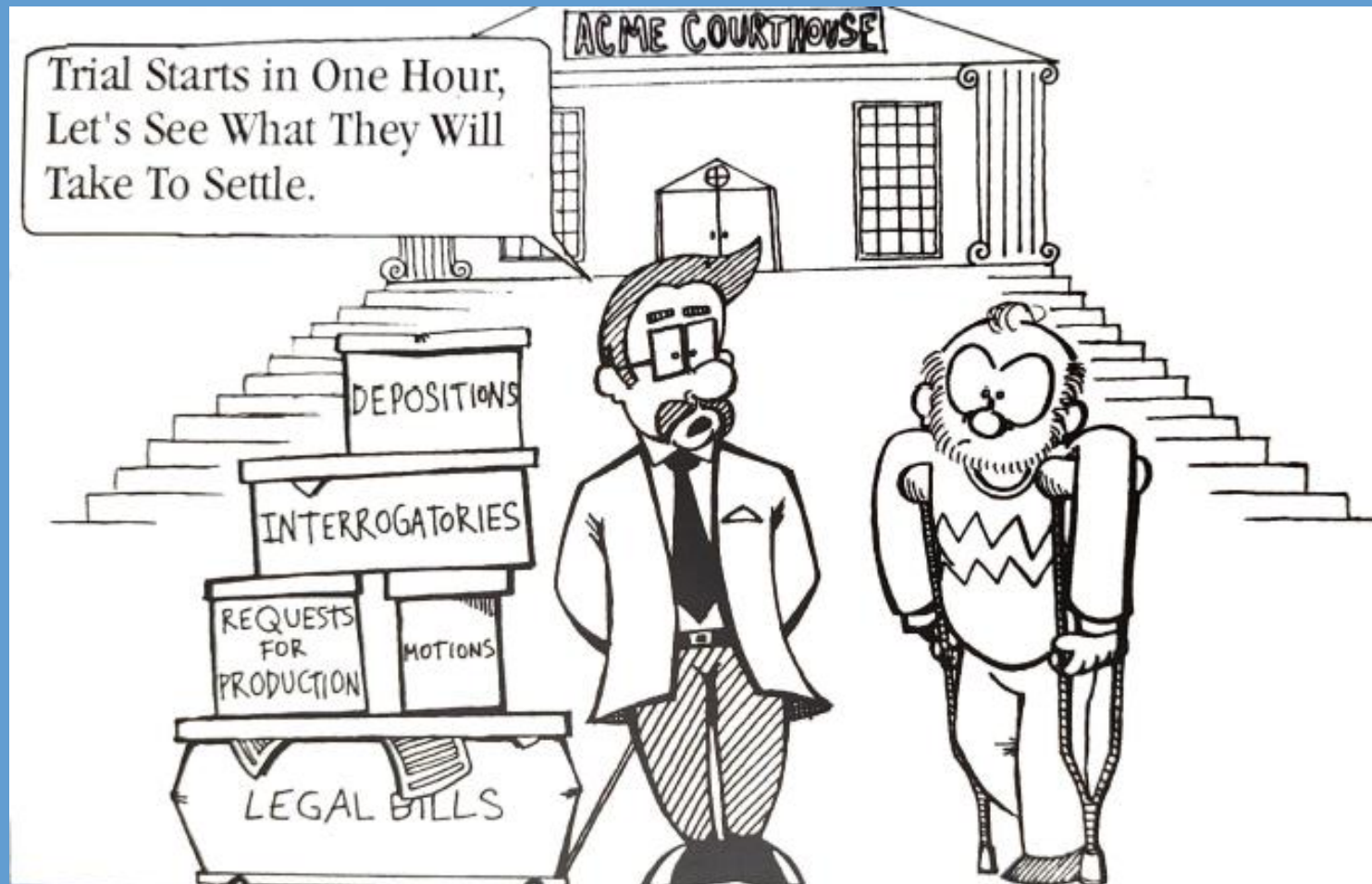
Lawyers Fail to Think About How They Conduct Themselves During the Mediation

Recommendation:

- Think about how best to interact with the mediator
- Recognize that just like a judge; you may be in front of that mediator again

- If you do something to anger the mediator in one case, it may haunt you in the next case
- If you do the mediator a favor in one case, it could benefit you in the next case
- Mediators learn your negotiating style and adapt (this is all the authority I have)

9. “It’s Too Early to Mediate – I Don’t Know Enough About My Opponent’s Case”



9. Mistake:

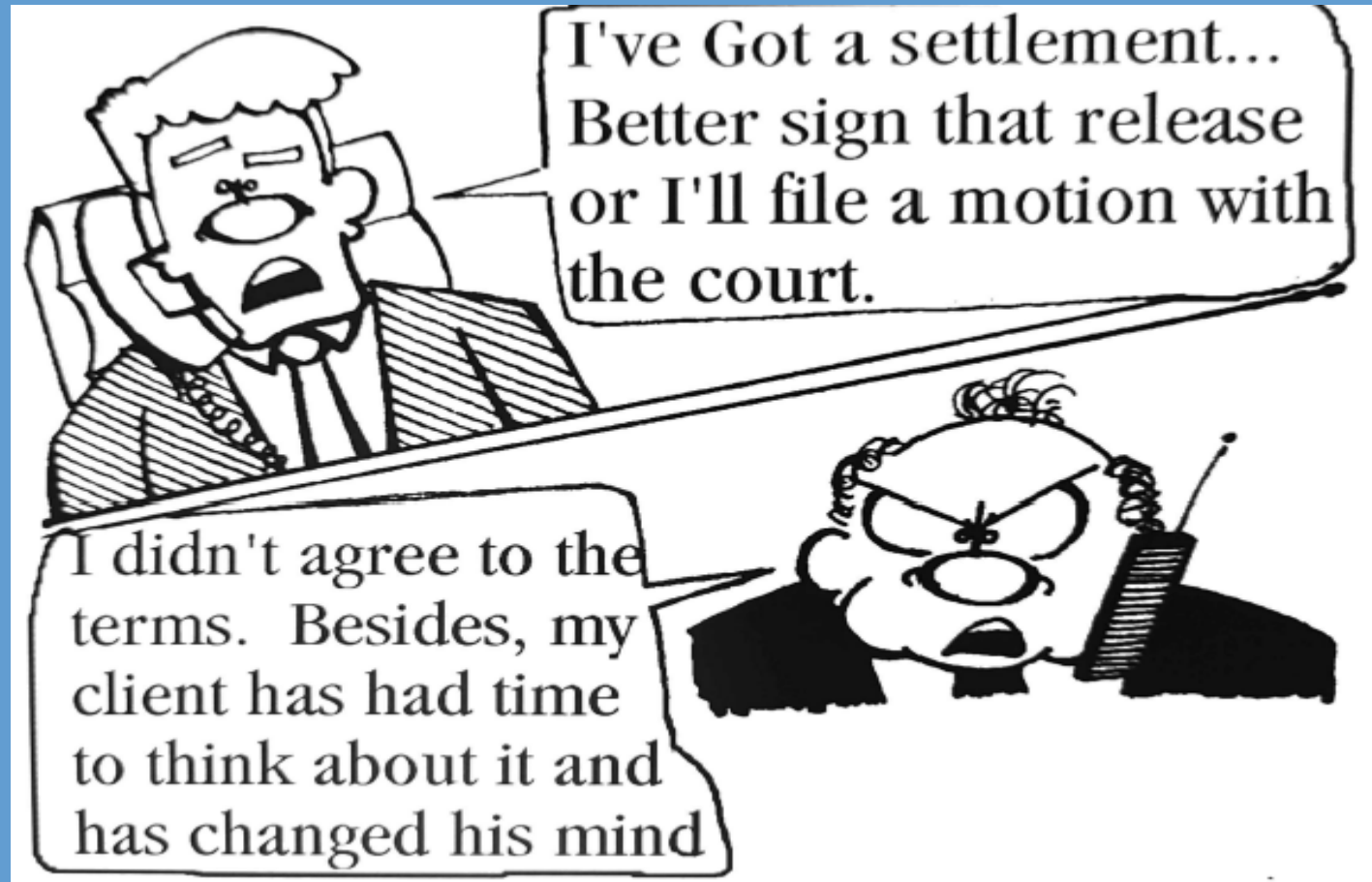
Lawyers Wait Too Long To Mediate Their Case

Recommendation:

- Try mediation early
- Mediation can be an efficient and cost effective discovery tool
- Mediation can narrow the real issues in dispute and lead to earlier settlement

- Waiting too long to mediate makes it more difficult to settle
 - “I can’t take that offer – I’ve already spent more than that on the case (plaintiff)
 - “All the discovery is done – I might as well see that the jury will do” (defendant)

10. "That Is Not What I Agreed To!"



10. Mistake:

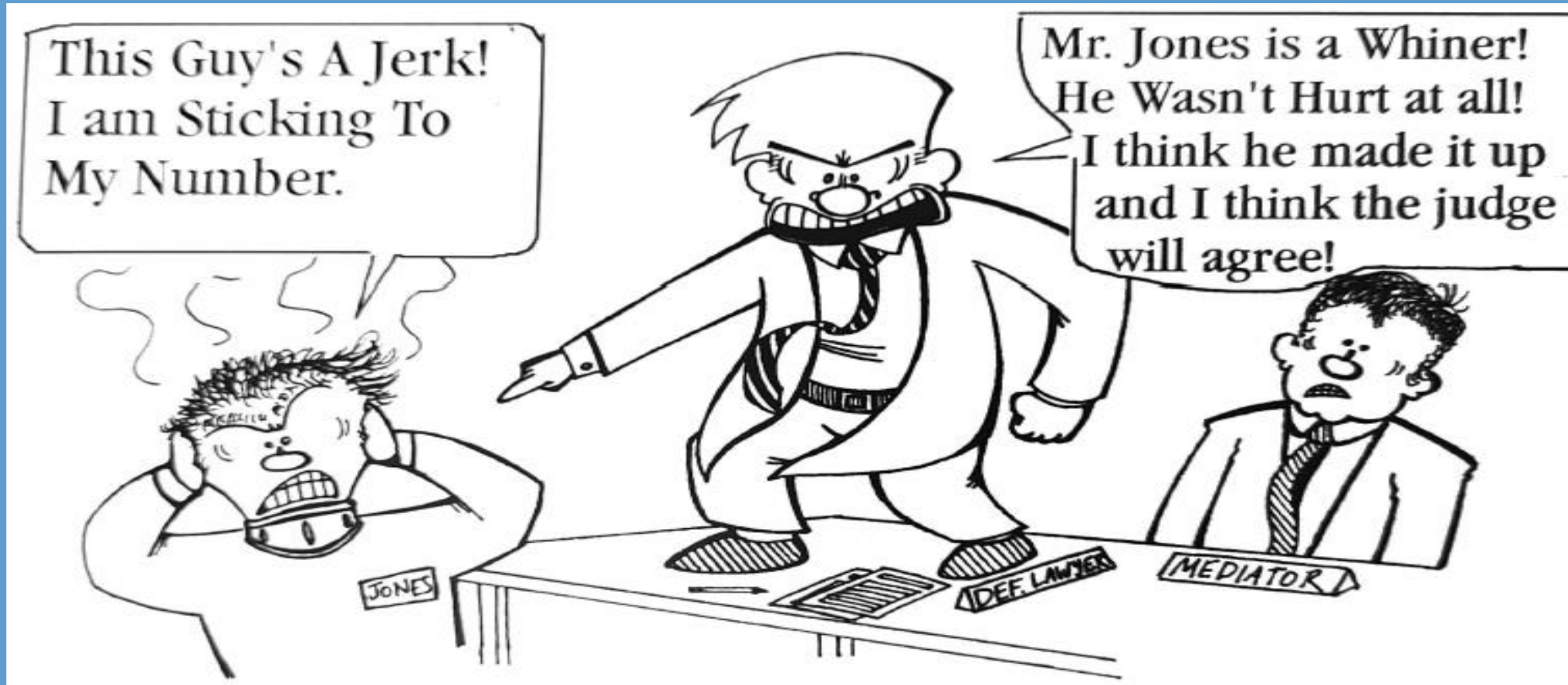
Lawyers Fail to Make Sure Their Settlement Will Hold Up Later”

Recommendation:

- Put the settlement in writing
- Put the agreement in writing before leaving (avoid leaving the mediation with an offer on the table – make every effort to finalize the settlement before you leave)
- Have the parties and their lawyers sign the settlement agreement

- You can't enforce an oral settlement – Rule 80(d) ARCP
- Don't give the other side an opportunity to change their mind
- Make sure your client understand what he or she has agreed to
- Protect yourself when your client later has a change of heart

11. "I'm going to Tell You What I Really Think of You and Your Case!"



11. Mistake:

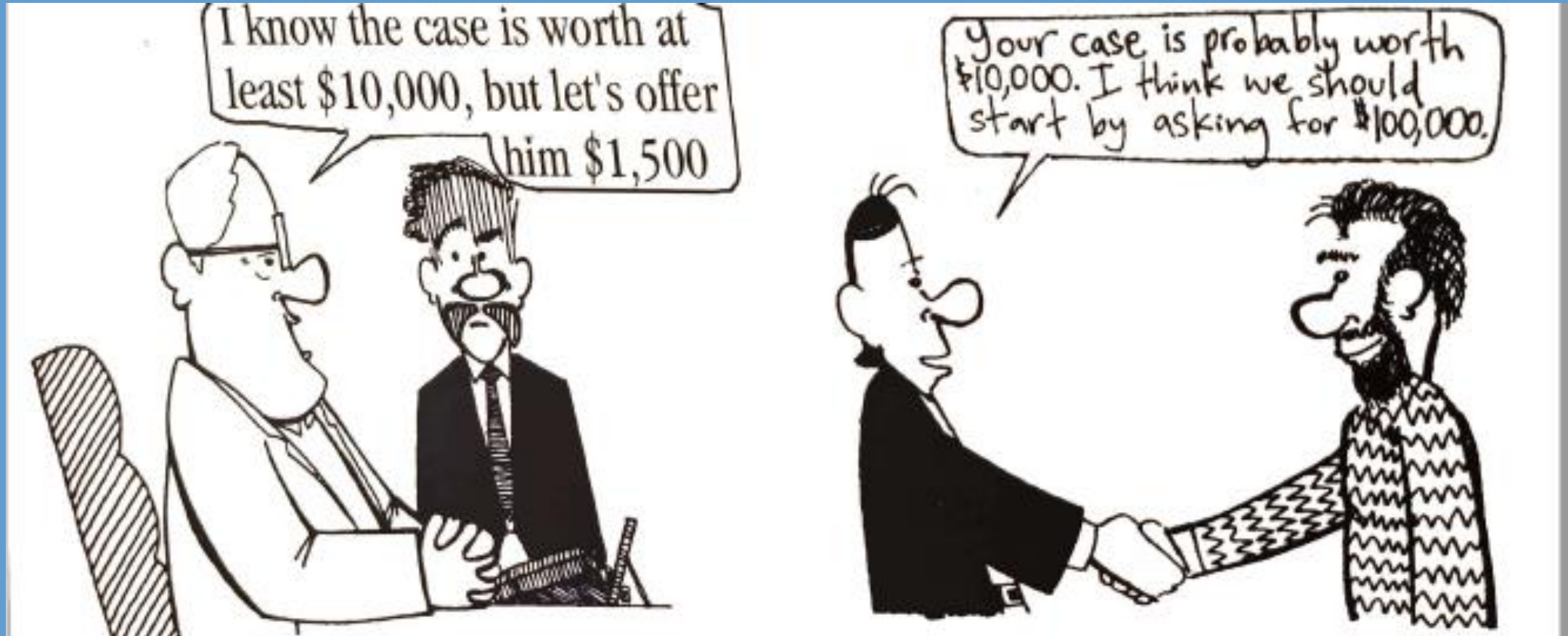
Lawyers Fail to Leave the Litigator at Home

Recommendation:

- Approach mediation with the right frame of mind
- Mediation is about compromise
- Mediation is conciliatory
- The fastest way to end a mediation is to attack the other side
 - Don't get off on the wrong foot with the other side

- Let your mediator do the dirty work – its more effective
- Help the mediator build credibility with the other side
- Give concessions where you can

12. “This Case Is Never Going to Settle – ...Let’s Go Home”



12. Mistake:

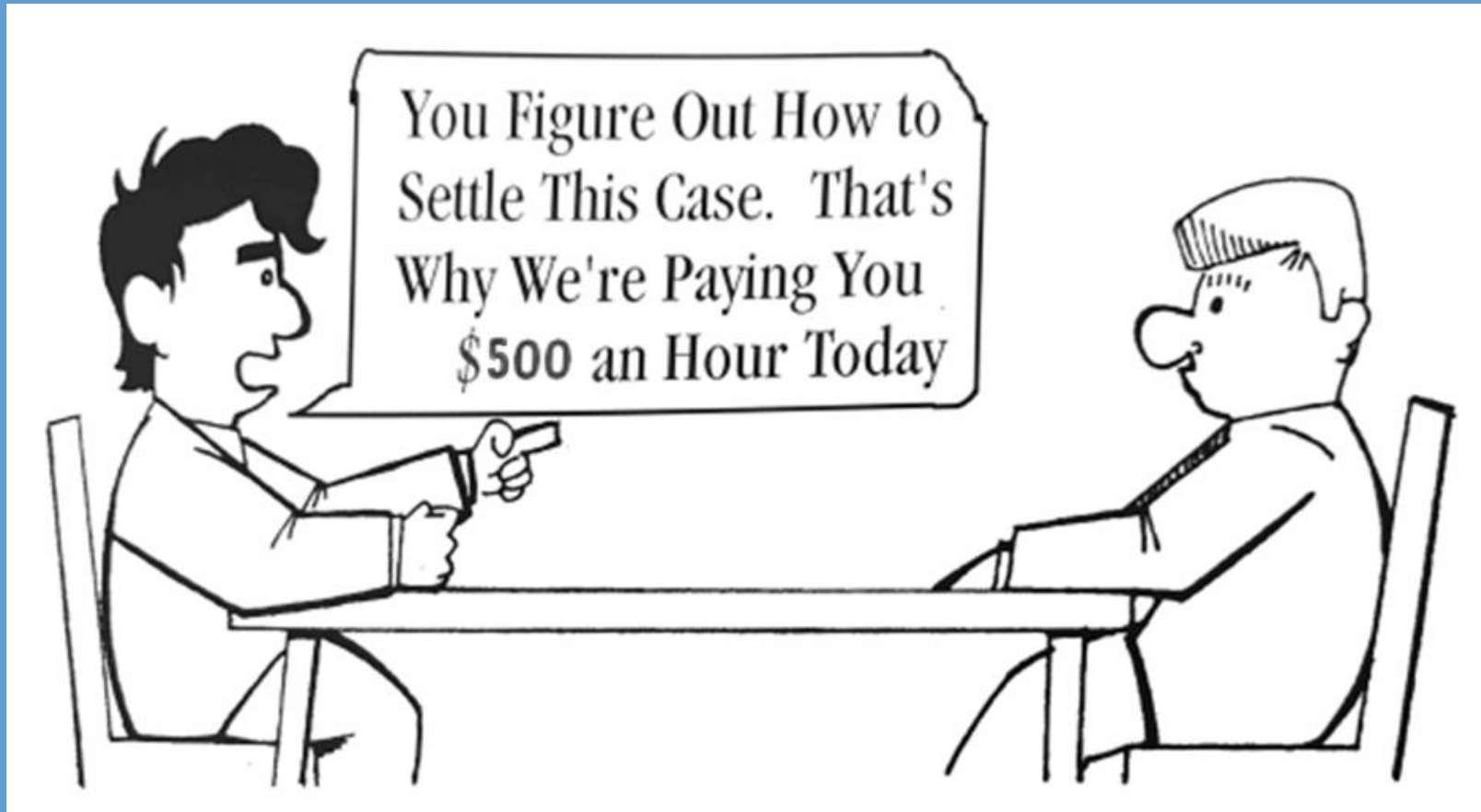
Lawyers Fail to Recognize That Mediation is a Process

Recommendation:

- BE PATIENT in mediation
- Be persistent
- Be reasonable

- Focus on the important issues; don't get side tracked
- Don't lose any momentum you gained during mediation by leaving too early

13. “Maybe Mediation Will Work”



13. Mistake:

Some Lawyers Want to Mediate Every Case

Recommendation:

- Recognize that not every case can be settled
- Mediators are not magicians
- Mediators cannot force one side to take the others last offer

- If you negotiated in good faith, if you exchanged all information and if you have nothing new to offer – don't waste your time or money on mediation

THE END

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