

Myths and Misconceptions of Negotiations in Mediation

By Amy Lieberman

Myth #1: People Mean What They Say

Reality: Absolute Statements are Expressions of Current Intent

Most of us believe that people mean what they say. But, in the heat of negotiation in mediation, people do *not* always mean what they say.

It's not that they are lying. They are just strategizing. What they are telling you is part of their negotiation plan. They may be trying to see if they can get away with not telling the whole truth – at least until they have to.

When one side says, “*We can't pay more than \$25,000,*” or “*My bottom line is \$150,000,*” the statement is absolute. But, be wary. Absolute statements are often simply attempts to convey how serious a client is about his position.

The myth is that a party “*can't*” do something. The reality is that “*can't*” most often means, “*don't want to*” or “*not willing to.*” The absolute statement should always be tested.

Consider the following statement in a letter I received from a lawyer before the mediation:

“If they don't open with at least \$100,000, we will take that as bad faith and will immediately leave the mediation.”

I never assume initial statements of positions, authority, goals, or even facts, are accurate.

If the lawyer's statement was true, the process was in trouble, and I needed to alert the other side, early. However, when I called the lawyer before the mediation, he told me he made this statement because he and his client recalled having verbal conversations with the other side, where they had informally discussed \$100,000 as an offer. The attorney told me the threat to leave was more an expression of his client's desire, not necessarily of what would really happen at mediation.

At the mediation, negotiations began at \$25,000. The case ultimately settled at less than \$100,000. Clearly, the lawyer did not mean what he said.

The key for both mediators and advocates is not to make judgments or assign negative attributes to someone who is not being totally straightforward. Realize instead that human nature is to try to get the best possible resolution for oneself, and as a result, people take positions that they believe will help them reach that ultimate goal.

Myth #2: We Can Do Better Than The Last Offer

Reality: The Last Offer May No Longer Be on the Table

People prepare for negotiation in mediation based on where they left off in past negotiations, believing that is the logical place to start. But, a party may appear at mediation with a completely different, and unexpected, position.

Past offers, whether verbal or in writing, are not binding if they are not accepted. Anyone can change their mind about what they may be willing to do to resolve a dispute, and even completely withdraw an offer. This dynamic can happen even within the mediation itself.

But, this situation leads to bad feelings and an accusation that the other is acting in bad faith. That's because, psychologically, it's hard to un-ring the bell.

The reality is that statements made verbally are subject to differing recall. The other side honestly may have no recollection of ever making a past verbal offer and thus feels no compulsion to start there. Or, perhaps an offer was made without real authority, but only to test the waters. “*If I could get my client to pay \$100,000, would your client accept that?*”

Other times, circumstances have changed since a past offer or demand was made. In one recent mediation, a company had offered an employee a transfer as a possible resolution many months earlier. By the time the mediation was held, the position was no longer available.

Finally, if much time has passed since a resolution was discussed, it is fair to assume that expenses have increased, more legal fees have been incurred, and the parties have suffered more frustration and distress.

So, to fully prepare, don't assume anything about where the other person may be coming from. (You know what happens when you assume!)

Myth #3: They Won't Change Their Mind

Reality: People Change Their Minds

People take positions based on a set of known circumstances. But then, life happens. Circumstances change.

Financial situations alter, so that a person who has brought a claim may end up needing money sooner, rather than later. So much time may have passed that the passion for prosecution has waned. A newly-divorced spouse may meet someone new, with different financial circumstances. Someone's basis for emotional support in the lawsuit may have changed. The economy may have impacted a party in unforeseen ways.

New information becomes available, which causes people to view outcomes that initially seemed unpalatable, as now, perhaps, reasonable.

The reality is that our minds are not static, but are always in a state of dynamic evaluation. Time goes on, and, if the mediator stays in touch, often one or both parties will in fact change their mind.

Myth #4: If It Can't Be Resolved Today, It Never Will Be Resolved

Reality: Resolution Is Always Possible

The best time to achieve resolution is at the mediation. People are physically present and mentally focused on one thing: resolution. Once they return to work and their lives, other distractions and influences can derail the process.

Often, a person believes that resolution is simply not possible because everyone gave it their best effort already and it didn't work. Yet, persistence pays off. It's important not to give up. As long as someone who is invested in the process stays with it, a safe zone is created for parties to change their positions. Even a slight move can help the process.

Relationships develop and discussions can continue. I have observed that the relationships that I develop with parties, or their lawyers, allow for more candid discussions than would otherwise occur, and resolution happens as a result.

Myth #5: A Court Will Hear the Truth and Justice Will Prevail

Reality: There is No Guarantee the "Truth" Will Lead to Justice

Clients can become very angry when they learn that someone denies making a statement they know was made. They say, "She's lying!" They want to go to court so the truth will come out and they will get the justice they deserve.

In the legal arena, the truth does not exist in and of itself. It must be proven. The truth is whatever the judge or jury says it is—not what one person knows it to be.

For clients, that can be a hard reality to grasp. If there is no incontrovertible proof, such as a memo or a video, the situation can become a "he said/she said" situation, which means it's anyone's guess as to how the "truth" will be determined by a judge or jury.

I've learned it is a waste of time to try and convince someone that things did not occur as they recall. Rather, it's important to educate people about the fact that there is a dispute—that they have different recollections—and ultimately, a judge or jury will decide which version they believe.

Understanding that the truth is what someone else concludes it is often helps refocus the analysis from a more objective point of view.

The belief that justice will certainly prevail is also a myth. Not only must a person convince the trier of fact that her version of the facts are

true, but she also must be sure that the judge or jury will apply the law to the facts correctly.

Judges are human, and they can make mistakes. That is the reason for Courts of Appeal. Attorneys file motions that keep key evidence out. Witnesses move away or forget important facts. All this means there are no guarantees that justice will prevail.

Myth #6: The Mediator Has the Right Answer

Reality: The Mediator Does Not Make the Decision

Parties to a conflict often believe that the mediator is the all-knowing conflict guru and will provide the right answer at the end of the day.

The mediator will often suggest alternatives or solutions for the parties to consider. The mediator's neutrality, though, does not mean the mediator has the one right or "fair" solution. The mediator has not lived with the conflict and may not know all the relevant factors that influence a party's thinking.

What seems fair to the mediator may not feel fair to the person hearing it. Moreover, once a solution is expressed as "fair" by the mediator, he runs the risk of losing credibility as a neutral from anyone who does not have the same perspective. Resistance might develop which will negatively impact the connection between the mediator and the party.

The ultimate answer will be the answer of the parties, not the mediator. They can, and will, arrive at that point with the mediator's assistance.

Your clients will be at a far greater place of peace when the decision is theirs, as compared to a solution generated by another and imposed upon them.

For this reason, it is far better for the mediator to withhold offering opinions until she is fairly confident all the important information has been shared. Remember, an opinion is only that: an opinion, which is always subject to change.

Conclusion

Knowing the difference between myths and realities, one of the mediator's primary goals is to educate each party and their counsel about the myths that apply in their cases. This guidance can be enlightening and helps parties evaluate their positions in light of what may be greater uncertainty than they imagined at the outset, increasing the odds of resolution.

The above article is excerpted from Amy Lieberman's new book, **"Mediation Success: Get it Out, Get it Over, Get Back to Business,"** available at Amazon.com or through MediationSuccess.com.



Amy Lieberman is the executive director of Insight Employment Mediation LLC and Insight Mediation Group LLC. She has been listed in "Best Lawyers in America" for Alternative Dispute Resolution since 2004. She can be reached at (480) 246-3366, or by email at amy@insightemployment.com.