



Anticipating the Obstacles

By Amy Lieberman

Amy L. Lieberman is a full-time professional mediator of employment and business conflict. She has repeatedly been listed in the Best Lawyers in America, Southwest Super Lawyers, and Arizona's Finest Lawyers in alternative dispute resolution, and is the author of the book, "Mediation Success: Get it Out, Get it Over, Get Back to Business." Visit her website at www.insight-mediation.com, or call Amy at (480) 246-3366.

While it may not be possible to pinpoint with certainty what causes any mediation to be successful, it is usually easy to point to a particular hurdle that blocked a successful outcome. Here, based on personal experience and discussion with fellow mediators, is my top 10 list of obstacles:

1. Unrealistic Expectations

Unmet expectations are the greatest source of frustration and anger. Discuss possible outcomes with your clients in advance, and guide them toward realistic expectations. Let them know what to expect in the negotiation process. Warn them that the positions you take are designed to meet the end goal, not to serve as absolutes. Discourage artificial and premature bottom lines. Urge them to keep open minds. Stress the need for patience.

2. Lack of Information

While new information is generally learned in mediation, if mediation is done early, some information simply has not been gathered or organized. This can include tax returns, financial records, expert opinions, witness statements, medical records, debts and full calculation of damages. Gather as much as possible, so everyone can make an informed decision.

3. Lack of Authority

This might be every plaintiff and mediator's top pet peeve. It is unbelievably frustrating to learn in the middle of mediation that the person negotiating only has limited authority. The ultimate decision-maker should at least be present telephonically, be updated throughout the process, and remain available, so there is no brick wall at the end of the session.

4. Failure to Prepare

While preparing for mediation isn't as extensive as for trial, it is a mistake to do nothing other than to submit prior correspondence or motions to the mediator. The goal of mediation is not to be adversarial or to win, but to be informative, consultative, and to resolve. It requires a different mindset, including a candid analysis for the mediator of strengths and weaknesses. Preparing a good pre-mediation memo forces you to think about the case in a different light.

5. Time Constraints

In a recent case, one representative stated that she had to leave at 2 p.m. to catch a flight. Everyone else had blocked the full day. The plaintiffs felt the defendant did not take the process seriously. The case settled only after protracted follow up over a period of months. The process takes time, and when counsel or a party needs to leave prematurely, settlement can be prevented. Scheduling conflicts should be avoided. If time constraints exist, they should always be disclosed in the beginning.

People often work to deadlines, so early disclosure can be helpful to the process.

6. Liens

Contact lien holders in advance, and see if they may agree to negotiate the amount of the lien. Disclose the lien amounts as early as possible in the process. Recently, a plaintiff withheld that information until several offers had already been placed. He eventually stated he could take nothing less than \$100,000 due to liens – information that would've been valuable for the defendant to know while evaluating strategy.

7. Insurance Coverage

The existence, or non-existence, of insurance coverage, can be an important factor impacting settlement. Are there coverage disputes? What is the deductible? Is there more than one policy? Who is the ultimate decision-maker? All information should be known and all persons whose consent is required should be part of the process.

8. Multiple Plaintiffs

In multiparty cases, the clients need to agree on the total amount *and* on how it's split. If possible, try to have the clients agree in writing to the percentage split in advance. They may learn information at the mediation that alters their view of the relative strengths of their cases, but if they have agreed in advance, the problem is avoided. Alternatively, obtain the clients' prior written agreement to have a third party make a decision as to the split, if they cannot agree.

9. Attorney's Fees

An offer can be made which may be perfectly reasonable, if only the party had not spent a small fortune in attorney's fees! If you anticipate that the sum spent on legal fees by your client may be a stumbling block, be sure the other side knows the approximate amount in advance, and/or be prepared with a response to your client if he suggests a reduction or accommodation on your part might be helpful to the ultimate settlement.

10. Exhaustion & Hunger

Half-day mediations sometimes run into and past lunch. Full-day mediations can run past the dinner hour. While lunch is usually accommodated, dinner is not. In one unusually long mediation, we delayed ordering food; certain resolution was only an hour away. Boy, were we wrong, and tired, and hungry! It was midnight before we closed. Parties who are nervous, anxious or tense about the process often lose their appetite and cannot bring themselves to eat. When this occurs, energy reserves are drained, and clear thinking is impacted. Be wise and come prepared with cereal bars, fruit, chocolate (chocolate is a food group, isn't it?) to hold you over in a crunch.

Anticipate these obstacles in advance, and increase your chances of success.