



# When Mediation Doesn't Work

By Amy Lieberman

**F**or over a year now, you have been reading my columns extolling the virtues of how well mediation works, 90-95 percent of the time. But – what about when it doesn't? What spells disaster for mediation?

**You aren't ready.**

You may not be ready because you haven't yet completed discovery and there are still key pieces of information you need to feel adequately prepared. Perhaps the judge ordered mediation and the parties aren't quite committed yet. If this is the case, your client may feel too uncertain about a decision to settle; he may not feel he is making an "informed" decision.

**You have the wrong attitude.**

The goal of litigation is to *win*, whereas the goal of mediation is to *resolve*. The conference room is very different from the courtroom. Resolution through mediation often requires considering giving up something the client wants, to gain the benefit of peace. Not so with resolution through trial.

Some trial attorneys can very ably take off their "advocate" hat, and don their "adviser" hat to support the negotiation needed to reach resolution. Others, however powerful they may be in the courtroom, simply are not able to shed that skin. The wrong lawyer can tank mediation by being overzealous. An advocate that is too strong can convince his client that his case has no weaknesses at all – a highly unlikely scenario.

**You do not have the right people.**

If you are missing the person with the most knowledge about what happened in the case, or the person with ultimate authority, you jeopardize the odds of success. This can happen when the decision maker is a board, a person on the East Coast who is no longer accessible, or someone with a conflicting commitment.

Another problem exists when all parties are not physically present. If one is available only by phone, or for consultation purposes, that person may get left out of the loop on important discussions.

**You do not have enough time.**

In a recent mediation set for a full-day, one side's representative announced that she had to leave at 3 p.m. for a 5 p.m. flight. Mediation is a collaborative process and requires all parties to have the same level of commitment. This not only artificially ended the process, but it also set a bad tone, as the other party felt they were not truly interested in resolution.

**You have not resolved other pending issues.**

The uncertainty of pending summary judgment motions can be helpful to the mediation process. But, there are other indirectly-related matters that can hold up the process. Examples include: bankruptcy (real or threatened); liens; divorce; insurance coverage reservation-of-rights conflicts; in a multiparty case, failing to gain consensus from class plaintiffs on a percentage split, or from multiple defendants on percentage contribution to settlement; family conflicts or disagreements.

**Your emotions are too high – or not high enough.**

If either the lawyer or the client are too vehement in their anger, the setting becomes focused only on "high drama," best to take a timeout and re-convene at a later date.

The opposite could also be the case: one side simply does not care about resolution, and would truly prefer to roll the dice in court. An unmotivated party clearly decreases the odds.

**Non-monetary terms prevent agreement.**

On occasion, the money is agreed to, but there are other issues that cannot be committed to at mediation. Such terms include apportionment of proceeds, taxation of settlement, public release of information, length of a required term of the agreement, the scope of the release language, a change in a contract for future action or change to a personnel action. Lawyers who practice in a focused area should plan for the non-fiscal aspects as well.

**You have the wrong mediator.**

You may be with a great mediator, but his or her strength is in a different substantive area, or he or she does not click with a lawyer or client.

**You lack client rapport or control.**

There has to be trust between an attorney and his or her client. If your client is not interested in following your advice, lawyer and client can become adversaries, which definitely hampers the process.

**There are too many cooks in the kitchen.**

In a recent mediation, one client was literally represented by three different law firms, who had not conferred on strategy or the approach to take at mediation. This lack of cohesiveness was detrimental to the process.

**What should you do when mediation does not work?**

Get more information if needed, and reschedule. Even if new information is not needed, revisit mediation some months down the road, as circumstances and positions change over time. Consider a different mediator. Go back to direct negotiations between counsel. Get a second opinion from a different lawyer if your client will not heed your sage advice.

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