WHY MEDIATIONS FAIL

By: Cecilia H. Morgan

The Survey

For years, I have had an anecdotal sense of why mediations fail or cases did not settle but no data to support it. Between October 2014 and March 2016, I received feedback from 220 mediators from across the United States – from the Texas Mediator Credentialing Association (Austin, October 2014), JAMS-Texas (Dallas, November 2014) the Dallas Chapter of the Association of Attorney Mediators (Dallas, January 2015) the DFW Arbitration Study Group (Dallas, October 2015), and JAMS Employment Practice Group meeting (New York/East Coast, March 2016) – for three reasons they believe mediations fail. The standard responses ringing in my mind was "wrong people, wrong time, no joint session." The responses fit into thirteen categories, including "other". The subtitles below represent the thirteen categories, and the number in parenthesis indicates the number of responses that fell into that category.

The methodology was very simple: I initially chose ten categories but the responses fit more appropriately into thirteen categories – including "other". The subtitles below represent the thirteen categories and the parenthetical number corresponding to the subtitle indicates the number of responses that fell into that category. The responses are addressed in reverse order of importance.

Minor Players

13. Third-Party Interference (9 responses). Interfering third-parties, well-meaning or not, frequently hamper, rather than facilitate, negotiations. A willing party at mediation might be unduly influenced to withhold their cooperation by a parent, grandparent or peer. These naysayers and antagonists usually have nothing personal to gain or lose by the outcome of the mediation, but nevertheless stymie the process. By the same token, if the wrong players are circled around the table, effective negotiation is impossible.

Practice Point: Prior to the mediation, confirm who will attend and whether they have the authority to resolve the dispute. Once you discover an absentee player who controls the result, offer to speak to them on the phone or postpone the session and reconvene when they can be present.

12. Money (12 responses). Understandably, money is frequently the reason for a failed mediation – whether it is the lack of settlement funds, insolvency or simply the sad state of the economy.

11. Prefers Court (16 responses). Often times, parties feel that they have a story to tell and they would rather tell it to a judge in a court of law. Some parties believe that they will prevail at the courthouse while others believe they will receive a larger settlement than the one that would be negotiated during the mediation process. Still others hope to save face by being ordered to capitulate their positions, financially or otherwise, instead of voluntarily relinquishing their views in a facilitated negotiation.

Practice Point: Don't be disappointed if the case doesn't settle. That might not be failure. Having mediated, remediated and mediated the same case on appeal, there are cases which need to be heard by a third-party decision-maker. It is not always a failure of the mediation that the case does not settle. As one attorney told me last week, "This case just had to be tried by these parties. There was too much at stake personally and professionally."

10. Other (20 responses). There are actually many reasons why mediation might fail and some are more obscure than others. Mediation is frequently the result of a contract mandate; parties that are forced – even though they signed the contract – to mediate often do so in bad faith. People become ill at the last minute. Attorneys determine that their clients lack mental capacity. Attorneys discover there are illegal activities in play. In brief, there are always circumstances beyond our control that can impact our best efforts to mediate at the given time.

9. Communication (22 responses). Communication, or miscommunication, is often the culprit in a failed mediation. Some parties, intimidated by their surroundings, the attorneys or the process, are afraid to speak up for fear of appearing ignorant or feeling that their point of view is not a valid one. Language barriers – both technical and native – muddy the process because parties, attorneys and mediators have different levels of vocabulary and industry relevant lingo. These barriers inhibit or prevent effective communication and the desired results of the mediation process are often lost. Miscommunication in the form of bad negotiation techniques make reconciliation a dim possibility. Also, the misrepresentation of facts and withheld information, whether intentional or not, obviously skew the envisioned outcome of the process.

The Middle Men

8. Authority to Settle (37 responses). It is essential to the mediation process that each party has a person or persons with ample authority to negotiate and settle disputes physically present at the mediation. No one wants to devote the time to a process that is doomed to fail because one party cannot effectively negotiate and settle. Likewise, no one wants to communicate with a faceless voice on a conference call.

Practice Point: In advance, confirm that the right parties will be physically present for the mediation. If the case is pursuant to court order, in both State and Federal court in Texas, you may remind the parties that the Local Rules provide that "a person with authority shall be physically present." In those circumstances, it is my practice to not agree to a telephone mediation without court approval.

7. Mediator (43 responses). Sadly, it was reported that entirely too often, the mediator was the reason for the failed attempt. When seeking a mediator, do your homework! The mediator should possess the appropriate skills; they should be an effective negotiator with knowledge of and experience with the process. A successful mediator will exert control over the situation and the process, keeping the negotiations moving toward the desired outcome. The mediator's ability to effectively communicate is essential and those with the ability to hear the words that are left unsaid are especially effective. Many times, the right mediator is one with the appropriate substantive expertise as well as procedural expertise. If the case is a complicated federal statutory action, a mediator with expertise in personal injury may be the wrong person. The mediator should be sensitive to timing and the flow of the process; as the end of day approaches, the mediator should be able and willing to apply appropriate pressure as needed to facilitate a resolution.

6. Mediation Process (44 responses). The mediation process, while malleable, must still flow within strategic parameters. If the timing of the order or the decision to mediate is too late or too early, the prospect of negotiation might be either too daunting or "too little, too late" in terms of tactical advantage. The mediation process can be misused or abused thereby rendering it moot. For instance, mediation is not a "fishing expedition" to augment other discovery techniques by parties who fully intend to proceed to trial. Another pivotal moment in the negotiation process is a well-timed, properly managed joint session. It is time well-spent for the parties to come together in the spirit of cooperation and enhance the mediation experience by diffusing – rather than escalating – emotions.

A joint session gives the mediator the opportunity to make a few peace-encouraging remarks to the parties, fostering a peace-seeking environment in which to negotiate. Additionally, remediation is used entirely too infrequently. Sometimes, a fresh start on a different day will yield the desired result.

The Big Five

5. Lack of Preparation (59 responses). Everyone at the mediation, as well as the efficiency of the process, will benefit from preparation. The client should be made aware of what to expect from the process, the attorneys should be up to date on all applicable laws and have more than a passing familiarity with their client's case as well as that the client hopes to achieve by mediating. The mediator should have foreknowledge of the facts of the case and whatever other information can be gleaned from pre-mediation communication with the attorneys. Preparation is key to the success of the mediation process.

4. Bad Faith (59 responses). No matter how successful mediation is, no matter how positive an option it might be, there will always be those who attend mediation in bad faith, refusing to cooperate and with no intention to settle. For whatever reason, they have no desire to be at the mediation and subsequently, they refuse to make any movement toward settlement. It's almost impossible to overcome bad faith in settlement negotiations.

3. Lawyers (61 responses). Unfortunately, the survey indicates that lawyers are undermining settlements at mediation. Some have a hidden agenda at mediation and progress towards settlement is secondary in their minds to accomplishing their own secretive agendas. Lawyers are not without egos, but a negotiation is no place for one. Their hubris might stand in the way of their client's desire to move forward with negotiations. Many lawyers see mediation as an opportunity to drum up more legal fees while others use mediation tactically, as a delay mechanism to the legal process. Sometimes, lawyers are too inexperienced in the mediation process or simply too inexperienced in general to represent their client's best interests.

2. Unrealistic Expectation (64 responses). There is nothing as disappointing as disappointment! Many parties and their attorneys enter into negotiations at mediation with unrealistic expectations about the process and/or its outcome, the money involved and/or anticipated and the risks involved. Mediation is not a panacea; there should be give and take by all parties.

1. Emotions/Ego (78 responses). Finally, the number one answer, our survey said, emotions! We all have them and should be able to master them for the few hours it takes to mediate a dispute. Whether it's hate, anger, pride, vindictiveness, anxiety masquerading as impatience, fear or vengeance, emotions dam up the essential flow of communication and obstruct progress. Analyze your emotions before the day of mediation and determine how to keep them under control and out of the negotiation process.

Be aware of the emotions that the participants commonly display and how they might be perceived. Take specific steps to respond appropriately to the emotions displayed. For example, remind parties that looking anxious weakens their bargaining position, so ask them to prepare and to stay calm; ask them to rehearse their statement in advance. The mediator will often interject humor or show empathetic reassurance that can dramatically change the tone of the interaction. If the claimant chooses to speak and bursts into tears, which is difficult for everyone to handle, then the mediator can hand him or her a tissue and say "I can tell you are very passionate about your position." rather than saying "I'm sorry you are so emotional!" which may only encourage more tears.

Practice Point: The joint session, properly managed, enhances the mediation experience by diffusing – rather than escalating – emotions. I like well-timed joint sessions in mediation. Parties with any continuing relationship need to have the opportunity to work out their future together at some point in the mediation. A joint session does not require that the parties make jury-like opening statements. A joint session does not have to be the first item on the agenda. A joint session can be a simple meet-and-greet with a few peace-encouraging remarks by the mediator only.

Cures and Best Practices.

Now that you understand why mediations fail, there are positive steps you can take to facilitate the mediation process to its best conclusion. First, it's important to properly time the mediation so as to gain the greatest strategic advantage. Second, parties and their attorneys should always prepare and communicate in advance. Third, recognize any unrealistic expectations and temper them accordingly. Fourth, identify and confront bad faith. Finally, embrace emotions – your own and those of your counterpart; understand them and how they will impact the successful outcome of mediation.

Cecilia H. Morgan (cmorgan@jamsadr.com) has been associated with JAMS since March, 1994, and has mediated, arbitrated and/or facilitated over 2000 cases in over 30 states. Named one of Texas' Best Alternative Dispute Resolution Lawyers (*The Best Lawyers in America)* in 2008 - 2016, a Texas Super Lawyer in 2012 - 2015, D Magazine's Best Lawyers in Dallas, 2013 - 2016, she is a Life Fellow for the Texas Bar Foundation and a Life Patron Fellow for the Dallas Bar Association Foundation. She was the State Bar of Texas' 2010 recipient of the Justice Frank G. Evans Award for Outstanding Contribution to Texas ADR. She has served as an officer and director at both the national and local levels of the Association of Attorney-Mediators, is a former national chair for the Legislation Committee of the American Bar Association Section of Dispute Resolution, is a former Chair of the State Bar of Texas ADR Section Council and is a Texas Mediator Credentialing Association Credentialed Distinguished Mediator. She served as Chair of the Dallas Bar Association's Labor & Employment Law Section in 2011 and is a Fellow of the College of Labor and Employment Lawyers. Since 2013, she has served as an Adjunct Professor for Texas Tech University School of Law. Her extensive experience as an ADR Professional includes business litigation, multi-generation, high net worth family settlement agreements, contract, employment (including collective FLSA, covenants not to compete/trade secrets, age, race and religious discrimination, sexual harassment, retaliation, FMLA, reductions in force/wrongful terminations and Sarbanes Oxley whistler blower claims) healthcare (including HIPAA, managed care and peer review) and oil, gas and energy.

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