

## Why Mediations Fail And What To Do About It

*Law360, New York (May 20, 2016, 11:00 AM ET) --*

I interviewed a number of colleagues and fellow mediators to research and discuss why they believe mediations fail. While I expected the standard responses “wrong people, wrong time, no joint session,” it was interesting to hear other experiences. The following responses are some of the more common reasons.

### ***Third-Party Interference***

Interfering third-parties, well-meaning or not, frequently hamper negotiations. A willing party at mediation might be unduly influenced to withhold their cooperation by a parent, grandparent or peer. By the same token, if the wrong players are circled around the table, effective negotiation is impossible.



Cecilia H. Morgan

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.

### ***Prefers Court***

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.

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.

### ***Communication***

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. 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.

### ***Authority to Settle***

It is essential to the mediation process that each party has a person 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.

### ***Mediation Process***

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. 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. 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.

### ***Lack of Preparation***

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. Preparation is key to the success of the mediation process.

### ***Bad Faith***

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. It’s almost impossible to overcome bad faith in settlement negotiations.

### ***Unrealistic Expectation***

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.

### ***Emotions/Ego***

Hate, anger, pride, vindictiveness and anxiety can typically masquerade as impatience, fear or vengeance, and 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.

## **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.

—By Cecilia H. Morgan, JAMS

*Cecilia Morgan is a JAMS neutral based in Dallas. She has served as an arbitrator and mediator in more than 2,000 matters over the past 20 years.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

---

All Content © 2003-2016, Portfolio Media, Inc.