

TEXAS LAWYER

An **ALM** Publication

texaslawyer.com | Friday, March 24, 2017

Why Mediations Fail

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FOR YEARS, I HAVE HAD AN anecdotal sense of why mediations fail but no data to support it. So, between October 2014 and March 2016, I polled 249 mediators from across the United States with a wide range of experience for the top three reasons they believe mediations fail.

The responses, listed in reverse order of popularity, fit into thirteen categories.

13. Third-Party Interference (9 responses). Interfering third-parties, well-meaning or not, frequently hamper, rather than facilitate, negotiations.

12. Money (15 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 (22 responses). Oftentimes, parties feel they have a story to tell and would rather tell it to a judge in a court of law.

10. Other (23 responses). There are actually many reasons why mediation might fail: people



become ill at the last minute; attorneys determine that their clients lack mental capacity; or attorneys discover there are illegal activities in play.

9. Communication (30 responses). Miscommunication,

whether in the form of bad negotiation techniques or the misrepresentation of facts and withheld information, is often the culprit of a failed mediation.

8. Authority to Settle (49 responses). It is essential that

each party has someone physically present at the mediation with authority to negotiate and settle.

7. **Mediation Process** (52 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, negotiation might lose its tactical advantage.

6. **Mediator** (54 responses). Sadly, it was reported that too often, the mediator was the reason for the failed attempt. The **mediator** should possess the appropriate skills and be an effective negotiator with knowledge of and experience with the process.

5. **Bad Faith** (66 responses). There will always be those who attend mediation in bad faith, refusing to cooperate with no intention to settle.

4. **Lawyers** (81 responses). Unfortunately, the survey indicates that lawyers undermine settlements at mediation. Some have a hidden agenda at mediation, and progress towards settlement is secondary.

3. **Unrealistic Expectation** (86 responses). Many parties and their attorneys enter

negotiations at mediation with unrealistic expectations about the process and/or its outcome, the money involved and the risks involved. Mediation is not a panacea; there should be give and take by all parties.

2. **Lack of Preparation** (91 responses). The client should be made aware of what to expect from the process and 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 what the client hopes to achieve by mediating. The mediator should have familiarity with the facts of the case and whatever other information can be gleaned from pre-mediation communication with the attorneys.

1. **Emotions/Ego** (106 responses). Finally, the number one answer to why mediations fail was 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.

There are positive steps you can take to facilitate the

mediation process. First, properly time the mediation to gain the greatest strategic advantage. Second, 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 – and understand how they will impact the successful outcome of mediation.

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