



Ten Common Reasons for Failure in a Mediation



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There are many reasons why a mediation can fail, even if all parties are well represented and generally inclined to participate in good faith. The following are some of the more common reasons for failure, a list that may be helpful to review in preparing for a mediation.

1 Lack of full accessible settlement authority. Effective mediation dialogue usually requires each party to have (or have ready access to) broad settlement authority. If persons with authority are not present, they must be readily reachable throughout the mediation.

2 Premature mediation. Parties will be cautious about compromising their positions without having a clear understanding of the claims against them and having reasonable opportunity to conduct discovery as to the supporting evidence. The minimal discovery needed for effective mediation will vary according to the complexity of claims and the degree to which parties understand each other when the dispute begins.

3 Lack of consensus on key issues. Mediation can easily fail if the parties have differing understandings of the key issues to be resolved. An experienced mediator should attempt to ascertain in advance whether the parties seem to have similar understandings of the issues to be mediated.

4 Limitations of the mediator. In the limited time available for mediation, the mediator must be able to grasp legal, technical and inter-personal issues quickly. A person with demonstrated skills as a methodical and dispassionate arbitrator is not necessarily skilled as a mediator. Technical experience in the subject matter in dispute can be helpful, but a mediator's ability to be a "quick study" may be even more important. If mediators have restrictions on their available time, those restrictions should be communicated to the parties at an early stage of mediation.

5 Counterproductive joint sessions. Joint sessions (e.g. with PowerPoint slides) are sometimes useful in illustrating complex technical subjects of dispute (e.g., in cases involving construction or design). On the other hand, adversarial presentations can evoke strong negative feelings and disrupt the pursuit of a rational mutually acceptable compromise. Many mediators disfavor joint sessions except in rare cases.

6 Unwillingness to provide rationale for settlement positions. At some point in most mediations, discussions of entitlement give way to offers of compromise settlement. Mediators should encourage parties to offer a legal or factual explanation for each such offer (e.g., in terms of assigning percentages of risk to specific claims). Offers that lack such support often lack credibility and lead to frustration of the settlement process.

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7 Hostility or distrust. Mediation is often most successful when the mediator can convince all parties to approach the issues in a rational manner. Disputes are much more difficult to settle if one party believes that other parties are devious or untrustworthy. Although such beliefs are sometimes justified, they are equally often a product of misinformation or over-reaction. It is often useful for mediators to help explain how an opposing party's position seems to be in good faith and understandable in light of available evidence.

8 Too many parties & too little time. When a dispute involves multiple parties or numerous specific issues, a single day may be insufficient to mediate a settlement between them. One alternative is to begin by attempting to mediate initially between two or three key parties. Another obvious alternative is to add more than one day for mediation.

9 Lack of access to key information. Parties in mediation should expect to offer documentation in support of their key contentions. If such support has not been included in pre-mediation submissions, it is helpful if parties can bring supporting data with them to the mediation (computer-stored data is particularly handy). It is also helpful if the place of mediation offers at least limited facilities for making quick copies of documents that address key points raised during the proceeding.

10 Games playing by parties or counsel. In a case where neither party is likely to recover an award of legal fees, it is often unreasonable for a respondent to offer significantly less than the fees it expects to incur to defend the case through trial. There is also too much energy devoted to some of the tactics by which parties deliberately make unreasonable offers in order to prod an opposing party into making the first significant compromise offer. There is no magic formula for leading a mediation to an "optimal" settlement, but much can be gained by making serious thoughtful offers that fairly and reasonably consider the strengths and weaknesses of a party's position.

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