



MY CASE DIDN'T SETTLE AT MEDIATION - NOW WHAT?

By Rande S. Sotomayor

Despite a full day of mediation, your case did not settle. Now that the mediation is over, what can you do to get the case settled? First, the mediation is *not* over. While the mediation *session* may be over, the mediation continues. Settlement opportunities are rarely lost.

The best way to decide what to do is to determine *why* the case did not settle. A deep dive into what impeded settlement that day will help eliminate the impediments and reopen negotiations.

WHY SOME CASES DO NOT SETTLE AT MEDIATION

The most common reasons settlement is not reached in a mediation session include:

- The case is not ready for mediation.
- Counsel and/or client are not adequately prepared.
- The client has unrealistic expectations and/or counsel does not have client control.
- A party does not have a genuine interest in settlement.
- There is a misunderstanding of the mediation process itself.

Readiness

If counsel do not have sufficient information to prove or defend their case, it is difficult to determine a reasonable settlement value. Accordingly, the case may not settle in a single session. However, the mediation session is not a waste of time. Counsel should identify and negotiate what is needed and how to get it to support continued settlement discussions. Creating a timeline and agenda for further discussion can be helpful in keeping the negotiations alive.

With a waiver of California Evidence Code §1125(a)(5), which provides that a mediation ends when there is no communication between the mediator and any of the parties for 10 days, the mediation does not end. There is no deadline for settlement. The parties can use the mediator to get there.

Preparation

Some cases do not settle during the first mediation session because parties and/or counsel may not be sufficiently prepared. Counsel should spend time reviewing and re-evaluating the case before mediation. Counsel should also have a realistic understanding of the opposing party's position and explain it to their clients. Attorney and client should closely consider what their options will be if the case does not settle.

Unprepared attorneys tend to draw lines in the sand too quickly. This could send a possibly unintended message that their clients are not interested in negotiations.



Unrealistic Expectations and Lack of Client Control

It is critical that counsel advise the client what to expect at mediation, including the necessity for counsel to abandon an aggressive adversarial approach in mediation.

Nobody should come to mediation intending to convince the other side to concede. Counsel should carefully manage the client's expectations. If the client is difficult to control or will not follow your advice, rethink the format of settlement negotiations and consult the mediator.

No Genuine Interest in Settlement

On a few occasions, I have worked with participants who have no intention of working toward settlement, but nevertheless proceed to mediation. This is one way to comply with a court order to mediate, although ethically questionable. This can also be a tactic to delay or to increase costs for the other side.

Misunderstanding the Mediation Process

Often, an attorney will ask what I think the case is worth. This is usually someone who has not done the necessary homework, is a new lawyer, or is a very experienced lawyer who is testing me for bias. The mediator does not determine the value of a case. That is the parties' job. The mediator is looking for the number (or deal points) that all parties can live with and allow them to move on.

There is a fine line between zealous advocate and wise counselor. In an effort to demonstrate their fierce advocacy, counsel (and therefore, clients) might miss opportunities to demonstrate their willingness to continue negotiations.

Emotional Obstacles

Sometimes a party is not ready to let go of the fight or to experience the loss of the "game" (gamble) for a big payout or a defense verdict. The mediator should recognize that parties need an approach that respects their individual emotional connections to the case. Unfortunately, there are people who are unable or refuse to hear anything but their own voice.

SOME SPECIFIC IDEAS TO REACH A SETTLEMENT AFTER A MEDIATION SESSION

Facilitate Further Negotiations

Mediation is rarely a waste of time. Typically, mediations at which a settlement was not reached nevertheless generate additional information for all parties.

For example, counsel and parties leaving my mediation sessions without a settlement will know that all numbers available to the parties *on that day* have been exchanged. They will know the genuine gap they need to close. The mediation session is a launching pad for further deliberation



and negotiations. An email or phone call to or from the mediator will often maintain the momentum and lead to settlement.

Take Time to Ensure a Durable Settlement

A mediation session that does not end with a settlement gives the parties an opportunity to “sleep on it.” Reflecting on the impasse and reconsidering the now-real alternatives to settling can lead to further discussions.

The Mediation is Not Over at the End of the Day

In my view, mediation does not occur only on a specific day. While the participants may be disappointed they did not settle the case at the actual mediation session, it is usually possible to reopen the door to further negotiations by simply following up with the mediator. Call the mediator the day after the mediation session and debrief.

Out-of-control clients often need "litigation therapy." A monthly bill from the litigator, or that increasing fear of losing at trial can trigger a revisit to settlement negotiations. The mediator is available to you at any time.

CONCLUSION

If you have concluded a mediation session without reaching a settlement, first determine the reasons the case did not settle that day. Then use the mediator to break down those barriers and restart the discussions. It's not over until it's over.