

Top Ten Barriers to Settlement & Top Ten Ways to Achieve Settlement

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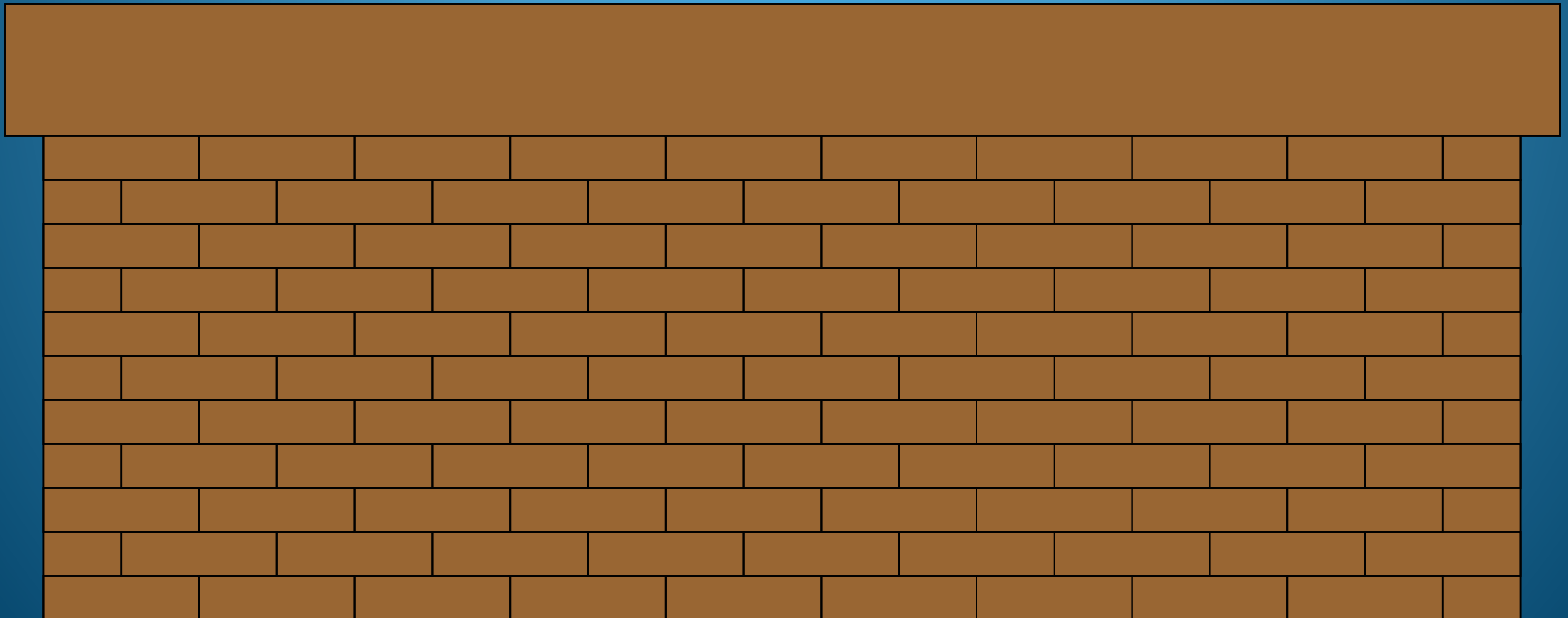
When Do Mediations Work?

Mediations work *only* when the parties want them to work



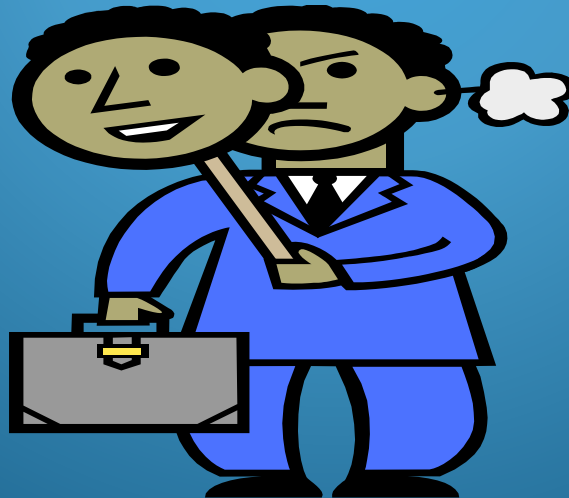
TOP TEN BARRIERS TO SETTLEMENT

Parties who want the mediation to succeed
must overcome these barriers:



1. Negative Attitudes

- The parties should enter the mediation process with the idea that the case can be settled
- If their attitudes are negative and expectations low, the mediation has little chance of success



2. Bad Faith

“Good Faith” requires the parties to enter into the mediation seriously, prepared for negotiation, and with adequate resources to resolve the issues at hand

Parties who mediate in “bad faith” are not willing to engage in a serious negotiation



3. Inadequate Settlement Authority

ADEQUATE AUTHORITY is a necessity

Make sure those with Settlement Authority are present for EACH side at any mediation

They may be:

- Claims Adjuster
- Plaintiff/Defendant Corporate or Personal Representative



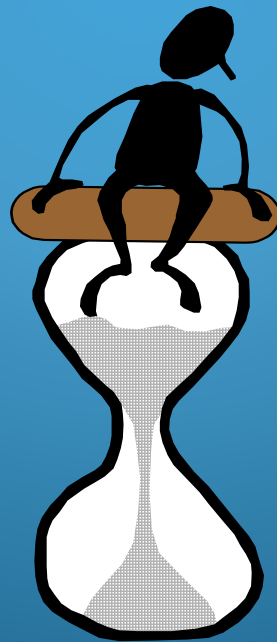
4. Inflexibility

To achieve the best measure of success, the parties **MUST** remain willing to bend. Inflexibility is rarely rewarded. You do not want a standoff.



5. Impatience

Mediation is a process, not a one-shot deal. Impatience by either side is potentially toxic. Threats to walk out after one or two proposals are damaging to the process.



6. Unrealistic Expectations

The parties must be REALISTIC in their expectations for settlement

The client's expectations concerning case value must be managed effectively

Inflated expectations are the proverbial “nail in the coffin” for any mediation



7. Unpreparedness

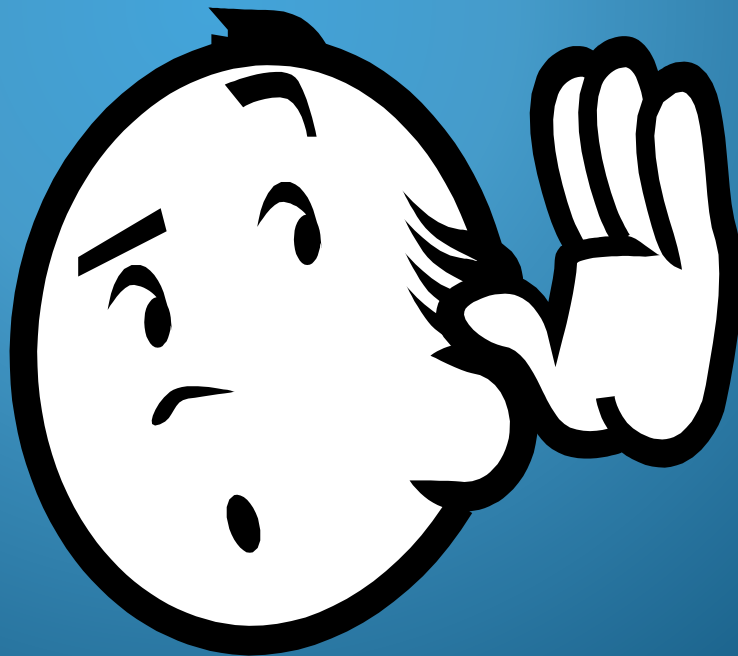
Lawyers must come to the mediation prepared:

- Know the client's case
- Evaluate its merits and pitfalls
- Combine preparedness with realistic expectations



8. Unwillingness to Listen and Heed

The mediator must facilitate active discussion between the parties. If a party is unwilling to listen to the other side, and heed the mediator's comments, the mediation will likely fail.



9. Ineffective Negotiating *Strategies*

An ineffective strategist:

- Is in denial about the weaknesses of his or her case
- Underestimates the strength of the other side's position
- Overvalues his or her own position
- Offends the other side
- Makes unreasonable demands



10. Ineffective Negotiating *Tactics*

An ineffective negotiating tactician:

- ❖ Threatens or insults the other side
- ❖ Overplays their hand
- ❖ Makes unreasonably high opening demands
- ❖ Makes unreasonably low opening offers
- ❖ Demands that the other side bid against themselves; or
- ❖ Attempts makes the other lawyer “look bad” in front of the client.



Ten Ways to Achieve Settlement

Temporary impasses are not uncommon. An effective mediator can overcome barriers by employing these techniques.



1. Be Creative

Think “outside of the box”



2. Narrow the Negotiating Range

Encourage negotiation within a specific range



3. Encourage Bold Steps

Encourage large moves where possible



4. Encourage “Baby Steps” if Necessary

Know when “baby steps” would be more effective than large moves



5. Be Brutally Honest

Don't be afraid to provide a "reality check" to both sides. However, being too forceful can be counter-productive. Be sure to alleviate the parties' stress, not contribute to it.



6. Listen to the Parties

Try to really hear what their position is and respond empathetically



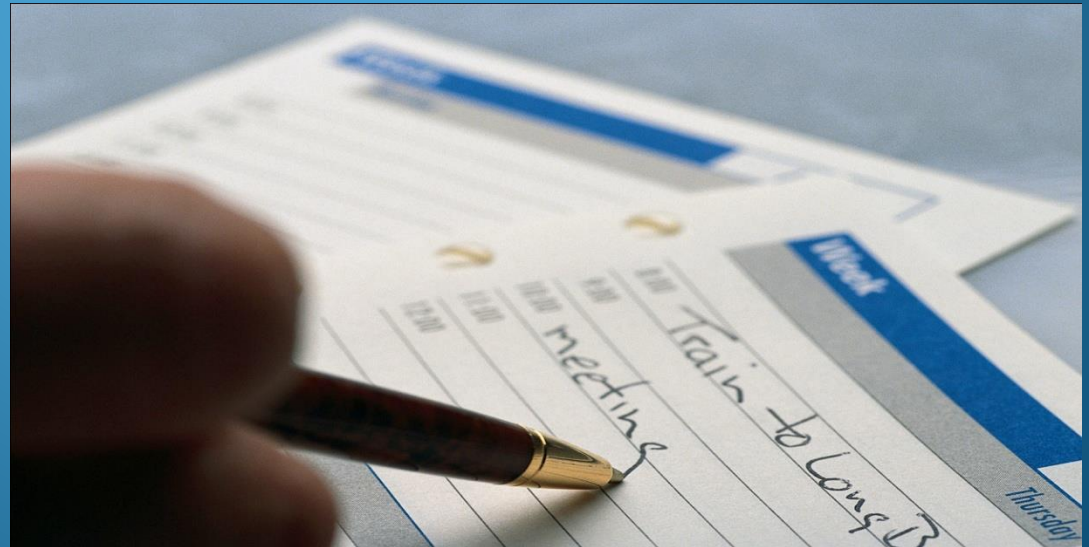
7. Suggest a Specific Settlement Amount

If all else fails, suggest a possible settlement number. This can be a relief to parties who cannot close the gap themselves.



8. Schedule Another Session

The parties sometimes need a chance to get more information, catch their breath, or regain their sense of balance. Rescheduling is a good strategy in these circumstances.



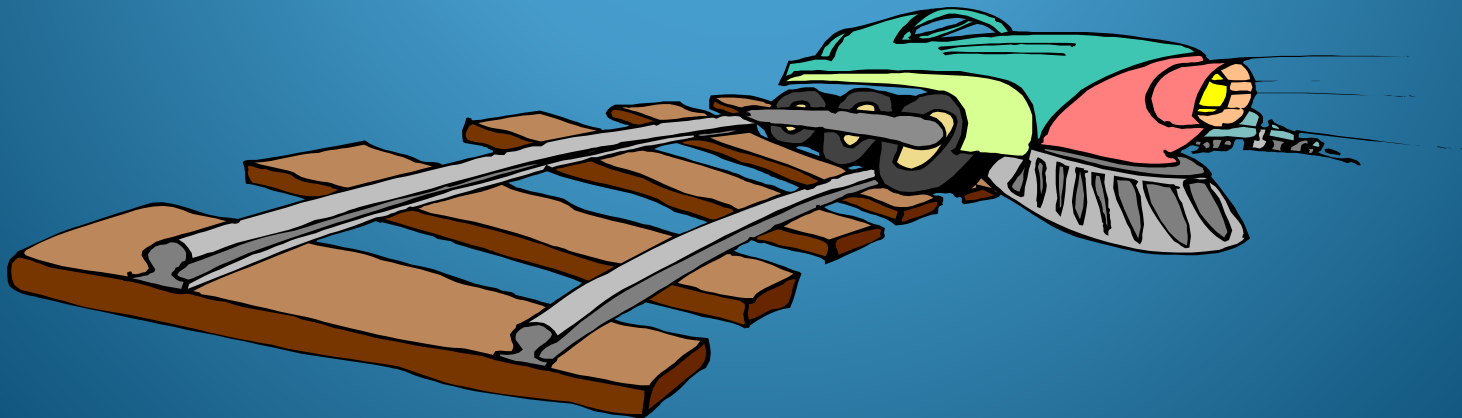
9. Emphasize the Advantages of Settlement

The parties sometimes need to focus on the primary objective: to resolve the litigation. By emphasizing the uncertainty of litigation, and the advantages of a resolution, the parties can regain their focus.



10. Get Derailed Mediations Back on Track

Some mediations get off track before they even begin. For example, miscommunication can occur between the attorneys regarding the amount of a settlement demand or concerning who should make the next move. The mediator must spend whatever time is necessary to get the parties to the starting gate.



Conclusion

MEDIATIONS WORK BECAUSE THE PARTIES WANT THEM TO WORK

- Keep your head on straight. Approach mediation with the right frame of mind.
- Employing these suggestions may dramatically increase your chance for success.

