ABRAMS MEDIATION & NEGOTIATION, INC.

Thirteen Objections to Mediation & Thoughtful Responses

By: Hesha and Jeff Abrams

1. **"We aren't interested in compromising. Suggesting mediation is a sign of weakness."**
   - Parties negotiate all the time over settlement proposals; mediation employs an expert facilitator of settlement discussions much the same way each party hires an expert on the factual issues—clients often want and need a resolution.
   - Mediation is about developing viable options, not giving up something.
   - Mediation is a form of facilitated negotiation; mediation is appropriate anytime one might consider a negotiated agreement.

2. **"We've already tried to resolve this ourselves…mediation would be a waste of time."**
   - A mediator can "reframe" interests, concerns and positions which frequently leads to shifts in negotiation strategy that can result in settlement.
   - Mediators are "agents of reality" and people often need an independent person to hear their side of the story even if that person does not have the power to decide the case—while mediation is <u>not</u> therapy, it can be therapeutic!

3. **"What good is a non-binding process when we need a resolution?"**
   - Negotiations are always non-binding until there is an offer and acceptance; the vast majority of mediations result in binding agreements.
   - A decision to reach agreement through mediation invariably produces greater satisfaction than an imposed decision; compliance with voluntary agreements is higher than with imposed judgments.

4. **"We think the other side is being unreasonable or engaged in a 'fishing expedition'."**
   - If the other were reasonable, the conflict would already have been resolved.
   - It is easy to maintain an unreasonable position in correspondence and pleadings; it is more difficult to sustain an unreasonable position during a detailed, face-to-face analysis of the case with the mediator.
   - You can leave if you feel they are negotiating with bad faith; and because the process is voluntary, you do not have to produce anything at the mediation that you do not want to disclose.
   - Mediators are sensitive to "fishing expeditions" and are skilled in facilitating the exchange of appropriate information to help the parties reach a resolution that satisfies collective interests.

5. **"It's too early to mediate. We haven't done enough discovery or research."**
    - The parties only need sufficient information to reasonably assess risk and analyze options; if the mediation seems premature, you may raise this issue with the mediator who can often facilitate the exchange of documents during the process.
    - Mediation allows the parties to explore their underlying interests, work on settlement options, and not debate positions.

6. **"Why should we mediate when we can go to a hearing or trial?"**
    - You maintain control of the process and outcome, unlike at a trial or arbitration.
    - Often the "winners" at a trial or arbitration are not satisfied, or feel that "politics" were an unwelcome part of the process.
    - Even if your case doesn't settle at the mediation, the issues will be streamlined for adjudication and you will better understand the entire case.

7. **"Mediation sounds good, but we are concerned about the cost."**
    - The cost of mediation is usually shared equally between the parties and often is the same as the cost of nominal factual/legal research or a deposition.
    - Sometimes the other side may be willing to pay the full cost; everything is negotiable!

8. **"We can't afford to waste any time, let's just proceed to hearing."**
    - The mediation can be scheduled immediately…when are you available?
    - Mediation will often take a single day…how long will the trial and preparation take?

9. **"We have a secret that we don't want the other side to know if we go to trial."**
    - The process is confidential so you can keep your "secret".
    - Often a judiciously timed disclosure of a "secret" is the impetus for a proposal with terms that may surprise you.

10. **"Mediation doesn't work in a 'zero sum game'."**
    - Not true; experience shows that if a case is susceptible to a negotiated resolution determined by the parties (and not imposed by the court), then mediation is a viable option.
    - Parties often find compelling reasons to settle that are not apparent on the surface; unstated interests govern most behaviors.

11. **"We have an airtight case—there's no way we will lose."**
    - Have you given your client a guarantee? Why does the other side disagree?
    - Often the "winner" doesn't feel victorious given the rigors of the adversarial process.
    - Mediation allows you to explore possible settlements and still maintain control.

12. **"We need a sound public policy decision and the policy makers won't be at the table, so how can we craft a resolution even if we wanted to?"**
    - A public policy mediated agreement is more likely to be approved if all the interested parties are at the mediation, so bring all of the stakeholders (*e.g.* developer, neighborhood group, staff, government attorney, etc.) — the approving body will be happy there is consensus and no political decision necessary.
    - A skilled mediator will help the adverse parties explore the public policy considerations inherent in the project; a private agreement that does not protect the public's interest is unlikely to be approved.

13. **"Will mediation put me out of business?"**
    - Attorneys are present at the mediation to protect their client's interests and participate in the negotiation.
    - Clients report high satisfaction with the mediation process.
    - You will garner a reputation for creative and prompt resolution of problems, which is why the client came to you in the first place.
    - Greater client satisfaction translates into client loyalty.

Hesha Abrams has been an attorney for over twenty years, and an active commercial and IP mediator since 1986. She was a pioneer in the mediation field serving on the legislative task force that drafted the landmark Texas ADR law. Before becoming a mediator, she worked as a trial lawyer handling complex business litigation. Hesha has successfully mediated for thousands of parties, is extremely persistent and is known for crafting highly creative settlements in very difficult cases. She specializes in IP and highly complex and/or emotionally charged cases. She has trained thousands of professionals in negotiation, conflict management, mediation skills, and dispute resolution systems design since 1986. She has done hospice work, hospital chaplancy and suicide crisis phone work, which enables her to work with the most difficult or intense situations and personalities. Hesha is a popular and dynamic speaker and is a member of the Texas Bar. She mediates, consults and trains both nationally and internationally. www.abramsmediation.com

Jeff Abrams has been an attorney for over twenty-two years, and an active mediator since 1986. Jeff has successfully mediated for thousands of parties and specializes in securities cases, commercial litigation, employment and business matters. He is a NASD arbitrator (chair) and is familiar with the psychology of people and markets. He was a pioneer in the mediation field, serving on the legislative task force that drafted the landmark Texas ADR law. He has been training attorneys, judges and executives in communication and negotiation, conflict management, mediation skills, and dispute systems design since 1986. Before becoming a mediator, he worked as a trial lawyer handling complex business litigation. He served as founding Editor of the ADR Report. Jeff is a frequent and popular speaker on ADR and workplace issues. He is a member of the Oregon and Texas Bars. Jeff was also President and CEO of a national fitness/ trucking company. His substantial expertise in both business and law enhances his mediation skill set and enables him to resolve even the most difficult and challenging cases. www.abramsmediation.com

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