

Thirteen Objections to Mediation & Thoughtful Responses

By Hesha Abrams, Esq.
www.HeshaAbramsMediation.com

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 not therapy, it can be therapeutic!
3. **“What good is a nonbinding process when we need a resolution?”**
 - Negotiations are always nonbinding 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.) ³/₄ 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 participation 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, Esq. a nationally acclaimed attorney mediator for over 30 years, is known for crafting highly creative settlements in very difficult cases. She has created settlements worth over \$700 million in the past year alone. She specializes in creating innovative solutions for complex or difficult matters in Commercial, Intellectual Property and “Deal Mediation”, which is driving a complex business deal to successful signing. She has the unique ability to work with big egos and strong personalities. Hesha has successfully mediated for thousands of parties and was an innovator in the mediation field serving on the legislative task force that drafted the landmark Texas ADR law. She mediates, consults, and negotiates on behalf of private parties throughout the country and internationally. She has worked in London, Hong Kong, Mexico, Thailand and India and with parties from all over the globe in complex patent licensing deals. She taught mediation and negotiation at the 2001 International Symposium on Negotiation and Conflict Resolution in The Hague. She was on the national panel for Dow Corning Implant cases and was the Chair of the Texas Bar Intellectual Property ADR Committee. She has been appointed Delegate to the Fifth Circuit Judicial Conference, 1988, 1990, 2002, speaker 2005, elected as a fellow of the Texas Bar Foundation in 2006 and received the Brutsché Award for Excellence in Mediation from the Association of Attorney Mediators.

For further information, see www.HeshaAbramsMediation.com.