

# The Top Ten Barriers to Dispute Resolution

By Joe Epstein, Esq. with Susan Epstein, Esq.

## Introduction

Years of legal experience and thousands of mediations have helped us to devise a list of the *Top Ten Barriers to Dispute Resolution*. When negotiators are determined to be effective and collaborative, recognition of these barriers will enable them to move the mediation process forward in a positive way. This knowledge will also help the thoughtful and determined negotiator break an impasse. The top ten barriers to dispute resolution that we see in mediation are:

1. Inadequate Planning and Preparation
2. False First Impressions and Perceptions
3. Grief
4. Systemic Distrust
5. Failure to Communicate and Listen
6. Insufficient Focus on Underlying Interests
7. Partisan Perception, Judgmental Overconfidence and Wrong Baselines
8. Reactive Devaluation
9. Misunderstanding the Loss/Risk Analysis

10. Failure to give Opponents Face, Respect and Dignity

## I. Inadequate Planning and Preparation<sup>1</sup>

When parties set a case for mediation, they should determine what discovery needs to be done in advance of the mediation. Insufficient discovery often means that the parties are not able to accurately evaluate the case. On the other hand, waiting too long to mediate can eliminate the transactional cost savings of the mediation process. We try to work with parties to prepare them and ourselves for mediation.

For example, in a multi-party burn case with clear liability, we learned from the defendants the damage information they required to evaluate the case and then arranged for the plaintiff's counsel to provide that information. We helped arrange for pre-mediation independent medical evaluations. A pre-mediation caucus with the plaintiffs was also arranged. Finally, in this case as in other high value cases, we ascertained information on the various layers of insurance coverage and were able to facilitate having the necessary decision-makers at the table.

In another recent multi-party case, we met with every party separately in advance of the mediation. Plaintiffs were asked to make pre-mediation demands and defense counsel were asked to bring the appropriate in-house counsel, risk managers and/or adjusters.

We recommend Counsel work the mediator regarding timing, "stage" setting and designating the decision-makers who need to be present at a mediation. In short, counsel and the mediator must **design** the mediation.

Furthermore, counsel must prepare themselves, their client, the opposing party and the mediator for the mediation. Preparation includes getting a feeling about the client's and the opponent's underlying interests, motivation, expectations, fears and concerns. Counsel should, similarly, role play the mediation with their clients and establish realistic expectations.

In preparing, counsel should consider that some cases lend themselves to an exchange of mediation statements. The purpose of this approach is to enable parties to evaluate the same case before and during the mediation.

The failure to creatively design the mediation, obtain discovery necessary for an accurate case evaluation or have the necessary decision-makers informed, involved and adequately prepared can doom a mediation to failure.

## II. False First Impressions and Perceptions<sup>2</sup>

This may be the most crucial barrier to successful dispute resolution. First impressions are terribly difficult to change. Decision-makers make their decisions on the data available at the time and they are slow to recognize and appreciate later contradictory data. The battleship once set in motion is incredibly difficult to turn about. Thus, the key is to make every effort to establish a good first impression.

These “first impressions” are set by client depositions, the quality of experts brought into the case, the efficacy of discovery and the “style” of counsel. First impressions, which are generally lasting impressions, allow a person the luxury of not thinking or reasoning. The very best way for parties to deal with this unfortunate and stubborn shortcut is prevention. Thus, parties should make the most of pre-mediation opportunities to favorably impress the opposing party. Perceptions are the lenses through which parties see themselves and their positions and others and their positions. Selective perception or stereotyping are frequently part and parcel of inaccurate first impressions. If parties cannot prevent these negative first impressions, they must be uncovered and addressed during the mediation. Like film producers and film directors, counsel must establish his client’s “first impression” before the mediation and reinforce it during the mediation.

## III. Grief<sup>3</sup>

Handling wrongful death cases, we were naturally brought towards the study of grief. Our research led us to the development of an alliterative tool

that we use to question victims, their attorneys and opposing counsel. Without addressing the issue of grief, negotiators face an emotional roadblock when dealing with the grieved party. Thus, we inquire into feelings of (1) rage, (2) revenge, (3) retribution, (4) remorse, (5) regret, (6) restitution, (7) relief, (8) respect and (9) resolution. We have concluded that many of these and similar feelings/emotions occur in sexual assault, employment, professional dissolution and business cases.

Counsel and mediators make a mistake if they do not address this potent barrier to dispute resolution. Simply put, one must avoid the temptation of “avoidance” of the grief issue and be willing to tap into those feelings. Actively and empathetic listening will help address this barrier to conflict resolution.

## IV. Systemic Distrust<sup>4</sup>

Zealous representation, winning at all costs, the hired gun, the adversarial mindset, etc. are all glorified in folklore, the litigators’ mystique and the culture of insurance carriers and corporations. This sort of mindset often sows the seeds of distrust.

Parties often begin a mediation distrustful of their opponent. This barrier needs to be torn down, not reinforced. Candid opening statements, acknowledgment of weaknesses, acknowledgment of the opposing party’s position, apology, advance pay, listening and revelation of negative information are all examples of trust building. Mediators, working with collaborative negotiators, can skillfully develop the trust necessary for conflict resolution. Our goal of building trust between the parties frequently causes us to engage in pre-mediation caucuses.

## V. Failure to Communicate and Listen

The failure to communicate begins with failing to remember the words of a Jewish sage:

*Each person was given two ears and one tongue, so that we may listen more than speak.*<sup>5</sup>

Native Americans have a valuable tradition of using a “Talking Stick.” The purpose of a Talking Stick is to give the person holding the Talking Stick the honor of speaking while all the others have the duty to listen. A Native American proverb capitalizes this goal as follows:

*“Listen or your tongue will keep you deaf.”*<sup>6</sup>

The corollary to this last proverb is that the speaker

*...must speak straight so that your words may go as sunlight to our hearts.*<sup>7</sup>

During a mediation, some parties need to express rage, anger, disappointment, grief and other emotions. Some parties require an apology or acknowledgment.<sup>8</sup> Others will find the key to resolution when they listen hard enough that they can walk in another’s shoes. Too often parties fail to communicate candidly, while others fail to listen or honestly share perspectives and feelings. Successful mediation requires that this barrier to conflict resolution be torn down as early in the mediation as possible.

## VI. Insufficient Focus on Underlying Interests<sup>9</sup>

Too often negotiators focus on the zero sum game involving the distribution of money. While this focus is appropriate, counsel, adjusters and risk managers often miss the opportunity to address core values that often impact the progress of a mediation and the ultimate level of satisfaction that can flow from mediation.

For example, in a wrongful death case involving the loss of an infant in a small community hospital, both the hospital and the parents had important underlying interests. The parents

needed to have their grief addressed and validated by a neutral and by the hospital administrator. The parents needed to feel that lessons learned from their devastating experience would be used to help others. On the other hand, the hospital administrator wanted his risk management team to utilize the parents input to develop a training program. He also wanted to acknowledge the parents pain and to provide support that would help them and give his staff a feeling of positive closure.

To this end, we fashioned a settlement that included a meeting between the relevant staff and the parents, counseling for the parents and grieving children and a risk management program. During the mediation, there were three face-to-face meetings between the hospital administrator and the parents that were important parts of the healing aspects of the mediation. Further, the mediator made sure that he addressed grief issues with the parents head on. We closed the day with the parents thanking us for our understanding and for making a rough day less difficult.

## **VII. Partisan Perception, Judgmental Over-Confidence and Wrong Baselines<sup>10</sup>**

Partisan perception involves the partisan filter that advocates bring to a case. What we see depends on where we stand, who we are and what we have seen before. Thus, with the same set of facts, advocates see a different reality. Mediators should require that the parties switch places. Maybe, if the parties would exchange their places they would not suffer from judgmental over-confidence in the evaluation of their case. Hopefully, with a balanced view, parties will not insist on proceeding from an inaccurate baseline evaluation.

If advocates and their clients will come to mediation with a collaborative perspective, and a willingness to listen to and consider other perspectives, these

inter-related barriers to dispute resolution can be addressed.

## **VIII. Reactive Devaluation<sup>11</sup>**

It is well recognized that if an opponent offers a suggestion, it will be given less consideration than if a mediator offers it. Similarly, if a party offers an opinion about the law or an interpretation of the evidence, it will be similarly discounted. The same opinions offered by a mediator will be given more consideration. Thus, it is imperative that parties prepare mediators for mediation, dealing with the mediator openly, honestly and persuasively so the mediator can express informed opinions and make helpful suggestions whenever necessary. Anticipation is the key to handling this barrier.

## **IX. Misunderstanding the Loss/Risk Analysis<sup>12</sup>**

Too often parties create a barrier to dispute resolution because their risk assessments do not factor in the full range of key decision points that the jury and the court will be considering. This problem often leads to unrealistic client expectations. Parties tend to be averse to risk regarding gain and would rather have a certain gain than an uncertain larger gain. On the other hand, people are risk-seeking with regard to loss. That is, they would rather avoid a certain loss and take a risk of a greater loss if there is some chance of avoiding that greater loss. In other words, some parties would rather postpone a certain loss (settlement) for an uncertain result in the future (trial).

In fact, parties with either perspective should be encouraged to address the realities that they will ultimately have to address. Effective negotiators will assist their clients and their opponent in addressing these realities.

Effective mediators will provide a reasoned reality check. Sensitive and effective mediators are mindful that "naked" truth is often rejected while truth clothed in parable is more readily

received.<sup>13</sup>

## **X. Failure to Give Opponents Face, Respect and Dignity<sup>14</sup>**

"Treat others how you would like to be treated" is an adage we all learned in childhood, yet we frequently forget to heed it in the heat of battle. Pointedly, in 500 BC, Sun Tzu, a Chinese consultant to a variety of warlords and emperors, wrote that the wise general does not press a desperate foe too hard. If you have the grace and good sense to let your opponent leave the battlefield with face, dignity and self-respect, he is more likely to avoid an unnecessary battle. Further, the opponent with no place to go, like the cornered tiger, may prove to be more tenacious and dangerous than expected.<sup>15</sup> Collaborative negotiators are nimble enough to avoid this common barrier to dispute resolution.

## **XI. Conclusion**

When tearing down the barriers to dispute resolution, collaborative mediators should be like "Bob the Builder" and construct a bridge to the other side. If parties and mediators address the underlying needs, interests and concerns while being mindful of giving others face, dignity and respect, they will resolve most disputes.

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Association (TIDA) newsletter.

### Endnotes

- <sup>1</sup> See generally, Joe Epstein and Steve Berkowitz, *Proactive Mediation*, TRIAL TALK, October/November 1999 at 13; See also, *Sun Tzu's Tips on Effective Mediation (Sun Tzu)*, Joe Epstein and Eileen Siskel, *Sun Tzu's Tips on Mediation*, TRIAL TALK, February/March 2001 at 36.
- <sup>2</sup> See generally, Joe Epstein, *The Powers of Psychodynamics in Shaping Mediation Outcomes (Psychodynamics)*, 33 COLO. LAW. 1 at 15 (2004).
- <sup>3</sup> See generally, SANDRA M. GILBERT, *WRONGFUL DEATH* (W. W. Norton & Co. 1995);, THERESA A. RANDO, PH.D, *HOW TO GO ON LIVING WHEN SOMEONE YOU LOVE DIES*, (Bantam Books 1991).
- <sup>4</sup> See generally, ROBERT H. MNOOKIN, *et al.*, *BEYOND WINNING*, 167-171 (The Balknap Press of Harvard Univ. Press 2000). See also, BENNETT G. PICKEN, *MEDIATION PRACTICE GUIDE*, 49-50 (American Bar Association Section of Dispute Resolution, 2nd Edition 2003).
- <sup>5</sup> RABBI KERRY M. OLITZKY & LORI FORMAN, *SACRED INTENTIONS*, 102 (Jewish Lights Publishing 1999); (*citing* Hasdai Ibn Cresces), See also , KENT NERBURN, *THE WISDOM OF THE NATIVE AMERICAN*, 10 (New World Library 1991).
- <sup>6</sup> TERRI JEAN, *365 DAYS OF WALKING THE RED ROAD*, entry for April 16 (Adams Media Corporation 2003) (RED ROAD).
- <sup>7</sup> RED ROAD, entry for April 2 (*citing* Cochise).
- <sup>8</sup> See, DOUGLAS NOLL, *PEACEMAKING*, 412-438 (Cascadia 2003).
- <sup>9</sup> See generally, *BEYOND WINNING*, at 167-171; see also, *MEDIATION PRACTICE GUIDE* at 49-50.
- <sup>10</sup> See generally, *BEYOND WINNING* at 167-171. See also, *MEDIATION PRACTICE GUIDE* at 49-50. See generally, *Psychodynamics* at 15.
- <sup>11</sup> See generally, *id.*
- <sup>12</sup> See generally, *BEYOND WINNING* at 167-171.
- <sup>13</sup> ANNETTE SIMMONS, *THE STORY FACTOR* 27(Basic Books 2001).
- <sup>14</sup> See *Sun Tzu* at 36; See also, Joe Epstein with Darby Sais, *Native American Wisdom: Lessons Learned From Mediation*, Fall 2003 PREVENTIVE L. REP., Vol. 22, No. 1, p. 27-31.
- <sup>15</sup> SUN TZU, *THE ART OF WAR* 35

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