



Joan B. Kessler

## The mediation isn't successful if the settlement doesn't stick

In my view, settling a case through mediation is just the starting place. Once the terms are agreed to, usually there are many steps before the matter is truly resolved.

It is critical to me that the settlement sticks after all parties work for hours and in some cases days, weeks or months to get terms of a resolution. Through the years, applying the communication strategies I learned and then taught as a college professor along with my experience in practicing law and mediating, I have come up with the following principles for keeping a settlement in place after the terms are agreed to by the parties:

### The principles

- **Verify that the participants attending the mediation are authorized to settle the dispute.** Many times the parties attending the mediation may not actually have the legal authority to sign on behalf of the entity involved. Make sure the authorized party is there. Sometimes, both husband and wife or other relatives are also necessary to have a full resolution. Sometimes a partner who is not attending the mediation may be the "money" person and needs to approve the settlement. Make sure to get all signatures of all parties involved on the deal point memo.

- **Verify that insurance carriers (if any) are sending someone with real settlement authority.** In this current economic climate, more and more insurance com-

panies may not send a representative or if they do, that individual may not have been granted settlement authority. I ask defense counsel to have the carrier give authority to settle before the mediation if at all possible.

- **Each side must be vested in the terms and conditions to feel "ego involved" in the resolution.** Getting everyone involved in the mediation process is critical. The more involved people are in the process, the more committed they are to the resolution and, therefore, the more likely it is that the terms of the settlement will be carried out. I usually say at the beginning of a mediation that neither side will be totally happy with the results, but that may mean it is about right. If all parties feel they were part of the process and are accepting of the results, the settlement terms are more likely to be followed.

- **Get a written term sheet signed by all parties (not just counsel) before concluding the session.** This is critical from a California case law perspective as attorney signatures alone on a settlement document may not be binding on the clients. Further, having all parties sign is important so that no one gets "buyer's remorse" after leaving the mediation.

- **If English is not the native language of a party, have a sentence in the participants' native language at the end of the term sheet** stating that the terms have been translated into the native language and then have both the partici-

pant and translator sign this statement. This helps to eliminate post-settlement claims that someone did not understand what they were signing.

- **Have a term in the term sheet/deal point memo that states that the settlement terms are enforceable** under California Code of Civil Procedure section 664.6 in the Superior Court and that pursuant to Evidence Code section 1123 the Settlement Agreement is enforceable, binding and admissible in a court of law, and all parties agree to its disclosure. Therefore, the Court can enforce the settlement, outside of the mediation, if either side tries to change their minds. Also, the settlement terms discussed in the mediation will be excluded from the confidentiality of the mediation process.

### Conclusion

It is my goal not only to settle the dispute but to make the settlement stick. Hopefully, these suggestions will assist you in really finalizing a settlement.

*Joan Kessler, a full-time mediator and arbitrator at ADR Services, Inc., received her Ph.D. in Communication, before she attended law school. She practiced law for 20 years, was a jury consultant and taught communications. She specializes in real estate, trust/estate, business, commercial, entertainment, and employment cases. Ms. Kessler may be reached at: [jkessler@adrservices.org](mailto:jkessler@adrservices.org) or direct telephone number (310) 552-9800. Her Web site is [www.joanbkessler.com](http://www.joanbkessler.com).*

