

An Analysis of Factors that Impact Achieving Settlement in Family Mediation

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INTRODUCTION

On the breakdown of marriage or other union, disputants may seek mediation as a dispute resolution method that aligns with their objectives. For parties to family mediation, arriving at a settlement is an outcome of considerable importance. Settlement is not a guaranteed outcome of mediation, and rates have been estimated to range from 40%-80%.¹ The dynamics of every dispute are unique, and the conclusion of mediation will be the culmination of multiple influences. Nonetheless, it is constructive to identify those factors that impede settlement, and those that make its achievement more likely. In this paper I will discuss five factors that impact achieving settlement in family mediation. They are:

- The timing at which disputants engage in mediation;
- The role of counsel in representing a client participating in mediation;
- Internal and external pressures to achieve favourable settlement rates;
- The skill of a mediator in overcoming late-stage impasse; and
- Attribution biases

The impetus for selecting these factors is that they are not readily apparent. Having an awareness of these determinants may help parties pursuing mediation and those delivering the service to optimize the mediation experience.

¹ Desmond Ellis & Noreen Stuckless, *Mediating and Negotiating Marital Conflicts* (Thousand Oaks, Sage Publications, Inc., 1996) at 103.

1. THE EFFECT OF TIMING OF MEDIATION

The timing at which family mediation occurs may affect settlement outcomes. There is some research to support that settlement rates are higher among participants who mediate prior to becoming involved in formal legal procedures.² A small study conducted by the Frontenac Family Referral Service in eastern Ontario found that of 81 participants in mediation, 79% of those who entered mediation prior to involvement in the court system reached full agreement on disputed issues.³ Among participants who mediated after filing a court application or retaining a lawyer, 54% reached agreement on issues.⁴ While the small scale of the study should be acknowledged, similar findings have been observed in other research settings. A review of studies looking at clients undergoing mediation found that timing of the process affected rates of agreement. Higher rates of agreement occurred among participants who mediated soon after separating, and before involvement with lawyers and the court system.⁵

There is a scarcity of data as to why this is the case. In my view, it is possible that participants who chose to mediate prior to filing a court application were the drivers of their issue resolution efforts, and were committed to arriving at solutions through mediation. Those mediating subsequent to a court application may have participated with the viewpoint that continued litigation was a viable, and possibly preferable alternative for reaching resolution.

² *Ibid.*

³ *Ibid.* at 90.

⁴ *Ibid.*

⁵ A. Ogus, J. Walker & M. Jones-Lee, "The Costs and Effectiveness of Conciliation in England and Wales" (1989) Conciliation Project Unit, University of Newcastle Upon Tyne.

The observation could also signal an effect of exposure to the adversarial system on disputants. It may change the dynamic of the dispute, making it more difficult for participants in mediation to progress toward an agreement. Other deterrents to mediation could occur once parties are involved in the court process. The influence of counsel could also be a factor.

Findings Within the Family Court

The question of whether there are elements of the court process that create barriers to productive mediation warrants closer attention. Recent research by Mamo, Jaffe and Chiodo offers insight into how the court process may affect mediation outcomes. The report “Recapturing and Renewing the Vision of the Family Court,” prepared for the Ministry of the Attorney General, presents research findings evaluating the service delivery and court operations of five of Ontario’s Superior Courts of Justice, Family Court Branch.⁶ Data regarding the delivery of court-connected mediation services was gathered. Publicly funded, voluntary mediation services are available on-site at the court facility, and at off-site locations. An unexpected finding was that most users of the off-site service had not filed a court application related to their dispute.⁷ The study revealed that once family disputes were proceeding through the court system, there were very few referrals to mediation by judges, lawyers and others involved in case management.⁸ As the study did not measure settlement rates, a comparison of mediation outcomes among participants before and after engaging in the court process cannot be made.

⁶ Alfred A. Mamo, Peter G. Jaffe & Debbie G. Chiodo, “Recapturing and Renewing the Vision of the Family Court” (2007) www.crvawc.ca.

⁷ *Ibid.* at 20.

⁸ *Ibid.* at 120.

The research indicated that the conventional litigation process predominates, in spite of the availability of subsidized mediation services. Lawyers do not appear to be turning to mediation for resolution of family disputes, and are instead settling cases between settlement conferences and trial.⁹ The study findings raise questions about the factors occurring during the progress of files through the court system to limit, discourage, or prevent opportunities for mediation. While a review of contributing factors is beyond the scope of this paper, in their interpretation of the research, Mamo, Jaffe and Chiodo offer related comments. They make the observation that the adversarial culture of litigation currently prevails in the Family Court structure, making it challenging for dispute resolution alternatives to be fully optimized.¹⁰ They suggest that a shift toward a dispute resolution culture is required before this can occur.¹¹

Application to Future Mediation Services

Insight into how the timing of mediation affects achievement of settlement is important for program planning purposes. Given the observation of favourable settlement rates when mediation occurs prior to court proceedings, it would make sense to recommend and enable mediation before parties become too entrenched in the litigation process. Such data is also important to consider when planning and implementing future court-connected mediation initiatives. One of the areas of debate raised in the Mamo, Jaffe and Chiodo report is the prospect of mandatory mediation for selected family law cases. They propose introducing a requirement that certain types of cases be referred to mediation as part of the case

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

management process.¹² The timing of referrals to mandatory mediation was noted as a factor in the section of the report advocating best practices. One of the best practices suggested was that in the circumstance of mandatory referrals to mediation, participants would ideally engage in at least two sessions of mediation prior to initiating a court action.¹³

2. ROLE OF COUNSEL REPRESENTING CLIENTS IN MEDIATION

A second factor relevant to achieving settlement in mediation is the nature of involvement of lawyers representing clients in the mediation process. A lawyer who has been retained to handle a client's divorce may suggest mediation to the client. A different partnership emerges when a disputant herself wishes to try mediation, and subsequently retains counsel to provide legal advice during the process. In other cases, mediation can be court-ordered, and a lawyer becomes involved reactively. In acting for a client, counsel is positioned to help or hinder the process. As the spectrum of lawyer-client relationships in this setting is wide, the following sections are illustrative, but not comprehensive.

Lawyers as an Impediment to Settlement

There is evidence that lawyers can frustrate the process of mediation.¹⁴ This in turn may impact settlement outcomes. In "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation," Dr. Julie Macfarlane, Professor of Law at the University of Windsor,

¹² *Ibid.* at 124.

¹³ *Ibid.* at 147.

¹⁴ Julie Macfarlane, "Will Changing the Process Change the Outcome? The Relationship Between Procedural and Systemic Change" (2005) 65 La. L. Rev. 1495 [Macfarlane, "Process Change"].

relates how litigators have responded to the introduction of mandatory mediation of civil cases in Toronto and Ottawa.¹⁵ As the focus is on mandatory mediation, and does not include family cases, findings may not have direct application to the voluntary mediation setting. Nonetheless, I believe it is constructive to understand the receptivity of lawyers to mediation in this setting, and how this in turn can affect settlement. In the future, if mandatory mediation in Ontario expands to include family cases,¹⁶ it may be useful to draw insight from research involving civil disputes. The research findings are outlined below.

The study identified reservations among some litigators as to the process of mediation, and also uncertainty about the expectations of their involvement. Macfarlane notes concerns expressed by some lawyers that mediation takes away some of the control of a case.¹⁷ Others feared the changing nature of the role of lawyer as advocate.¹⁸ Uncertainty about how to be effective when representing a client in mediation was another response. This was captured by one lawyer who offered the following: “I don’t think people really know what makes a good lawyer for the client in a mediation. We are starting to see what makes a good mediator. But I’m still at odds as to what role I really play.”¹⁹ Certain practical concerns were also raised, such as loss of business to mediators.²⁰ Discomfort with the role was evident in earlier studies by Macfarlane looking at mandatory mediation. She has commented on the reasons behind this.

¹⁵ Julie Macfarlane, “Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation” (2002) 2002 J. Disp. Resol. 241.

¹⁶ *Supra* note 6.

¹⁷ *Supra* note 15 at 255.

¹⁸ *Ibid.* at 281.

¹⁹ *Ibid.* at 299.

²⁰ *Ibid.* at 283.

Representing a client in mediation requires a lawyer to view case management in a radically different manner than that applied in a litigation-focused approach.²¹ Litigators tend to approach cases as though they are going to trial, even though this occurs infrequently.²² Among litigators she has studied, some understood their role to be highly adversarial, and even perceived this as a cultural expectation.²³ It is evident how this mindset would be incompatible with productive mediation.

The extent and manner in which a lawyer prepares for mediation also has implications. One research observation indicated that where counsel viewed mediation in a negative manner, clients went into the process without a readiness to settle.²⁴ Efforts by counsel to prepare the client for mediation are considered important, and their absence detracts from the usefulness of mediation sessions.²⁵ Several studies have determined that a lack of preparation for mediation on the part of lawyers correlates with not achieving a settlement outcome.²⁶ Dr. Macfarlane has referred to some of her earlier research in commenting on this finding.²⁷ She noted that court-connected mediators pointed to lack of preparation by counsel as a primary factor in failure to settle.²⁸

²¹ Macfarlane, "Process Change," *supra* note 14 at 1489.

²² *Ibid.*

²³ *Ibid.* at 1491.

²⁴ *Ibid.* at 1495.

²⁵ *Supra* note 15 at 261.

²⁶ *Ibid.*

²⁷ Julie Macfarlane, "Court-Based Mediation in Civil Cases: An Evaluation of the Toronto General Division ADR Centre 56" (1995) Queens Printer for Ontario.

²⁸ *Supra*, note 15 at 261.

Measures to Address Concerns

These examples have revealed how lawyers acting for clients in mediation can frustrate the process. Can measures be taken to address this? If clarity of role during mediation is at issue, educational efforts such as Continuing Legal Education could be useful. Reference materials directed at lawyers acting in this type of client relationship are available.²⁹ There is also the remedy of experience with the process. There is research to support positive attitudes among counsel toward mediation with repeat exposure to the process.³⁰ I would also submit that a responsibility lies with lawyers themselves to exercise an open mind to non-adversarial dispute resolution.

Lawyers as Contributors to Productive Mediation

The observations highlighted in the previous section indicate barriers to settlement. Leaders in the mediation field have also identified ways in which counsel can be effective in mediation. The ADR Institute of Canada has stated that: "Lawyers can make significant contributions to the mediation process and can increase the possibility of a successful settlement being reached if they understand the dynamics of the mediation process and use the appropriate skills."³¹ Toronto lawyer-mediator Cinnie Noble in her reference book *Family Mediation: A Guide for Lawyers* views the goal of client representation as one of helping the client be an effective participant in the mediation. The process can then advance to an outcome the client finds fair

²⁹ Example provided in next section: "Lawyers as Contributors to Productive Mediation."

³⁰ Macfarlane, "Process Change," *supra* note 14 at 1498.

³¹ Robert M. Nelson, *Nelson on ADR* (Scarborough: Thomson Canada Limited, 2003) at 81.

and reasonable.³² As an independent legal advocate, a lawyer can assess the suitability of mediation, select a mediator, and prepare the client for mediation. As a protector, a lawyer can be vigilant to imbalances of power among parties to the mediation, and alert the client when rights are being compromised. As a strategist, a lawyer can help the client understand the outcome options available, and their relative merit.³³ There is a scarcity of research examining whether engagement of counsel in this manner has direct bearing on achieving settlement. However, it can be premised that these behaviours would create an environment where a settlement can be reached.

3. SKILL OF THE MEDIATOR IN OVERCOMING IMPASSE

Impasse can occur in mediation, and threatens to terminate the process before settlement can be reached. Its occurrence in the final stages of negotiation has been termed by some as the “last gap,” and can mark a situation where parties have agreed on all but one issue.³⁴ The skill of the mediator to assist participants in moving beyond this blockade is the third factor I will address.

³² Cinnie Noble, *Family Mediation: A Guide for Lawyers* (Aurora: Canada Law Book Inc., 1999) at 33, 105.

³³ *Ibid.* at 33. Note that additional functions for lawyers acting for clients in mediation are described in the book.

³⁴ John H. Wade, *The Negotiator's Fieldbook*, 1st ed. by Andrea Kupfer Schneider & Christopher Honeyman (Washington, D.C.: ABA Section of Dispute Resolution, 2006) at 467.

Conflict as a Contributor to Impasse

Family mediation can require months of continued effort.³⁵ The emotional and financial drain over this length of time is considerable. To halt the process in the late stages without reaching a settlement can be frustrating, unsatisfactory, and costly for the parties. A complex interplay of variables can lead to impasse at this stage. Loss of face can be a contributor, where a party feels he has conceded more than he ever wished to, and is unreceptive to further concessions.³⁶ Some clients in a conflict situation cannot disconnect from the dispute, and thrive on its continued existence.³⁷ This could signal an attachment to the conflict, based, in part, on fear of the void that will replace it once the conflict has ended.³⁸ Researchers have examined spouses in high-conflict divorces, and have sought to understand the reasons for continued conflict.³⁹ For some divorcing couples, conflict helps to delay the pain of grieving. As long as the fighting is alive, they do not register the pain and sadness of their marriage breakdown.⁴⁰ A spouse in a high-conflict divorce who was shocked and traumatized by the separation may feel compelled to continue to fight to reclaim a sense of control and self-worth.⁴¹

³⁵ British Columbia Ministry of Attorney General, *Characteristics and Outcomes of Dispute Resolution Processes Related to Family Justice Issues: A Review of the Literature* (Family Justice Services Division, 2004) at 18.

³⁶ *Supra* note 34.

³⁷ Michael P. Silver, *Mediation and Negotiation: Representing Your Clients* (Toronto: Butterworths Canada Ltd., 2001) at 145.

³⁸ *Ibid.* at 146.

³⁹ Hanna McDonough & Christina Bartha, *Putting Children First* (Toronto: University of Toronto Press, 1999).

⁴⁰ *Ibid.* at 92.

⁴¹ *Ibid.* at 94.

Saposnek in *Mediating Child Custody Disputes* offers the following observation of divorcing couples undergoing mediation: "...each spouse's capacity for flexible compromise, for empathy, and for dealing with often overwhelming feelings of anger, grief, jealousy, resentment, and revenge is [also] challenged."⁴² A mediator when working with divorcing spouses must manage the emotional aspects of the mediation process without permitting their interference in problem-solving.⁴³ Given the volatility of the situation,⁴⁴ it is not surprising that couples can reach an "emotional impasse" in the process.⁴⁴ Mediators with the appropriate training and experience may be positioned to deliver brief therapeutic interventions specifically aimed at clearing this impasse and moving the parties back to productive negotiation.⁴⁵

Successful Outcomes Demand Expertise

A mediator's ability to diagnose the dispute dynamic and address it effectively is critical to achieving an acceptable mediation outcome. A mediator must have a comprehensive understanding of the causes of continued conflict, and of the motivators of parties who insist on perpetuating it. It has been recognized that a certain percentage of high-conflict divorcing spouses are simply unable to overcome their hostility to arrive at agreement through mediation.⁴⁶ This bears no reflection on the talents of the mediator. The expertise of the mediator can be effective in moving parties beyond impasse. Once the underlying conflict has been defined, targeted tactics can be applied. An illustration of such an approach is provided

⁴² D. Saposnek, *Mediating Child Custody Disputes* (San Francisco: Jossey-Bass, 1998) at 36.

⁴³ *Ibid.* at 44.

⁴⁴ *Ibid.* at 55.

⁴⁵ *Ibid.*

⁴⁶ *Supra* note 39 at 91.

by psychologist and professor Jean Poitras in “Strategies for Diffusing Hostility in Mediation.”⁴⁷

Three variants of hostility that affect disputing couples are tactical hostility, reactive hostility and cathartic hostility, each of which can impair progress toward agreement. Diffusing hostility among mediation participants requires identifying the specific variant of hostility and applying customized tactics.⁴⁸

Expertise as a Differentiator

If one party is reluctant to let go of the conflict and take the final necessary steps, a mediator’s ability to create a safe environment could make the difference in resolving the dispute. Given the lack of standardization of the qualifications of mediators in Canada,⁴⁹ success in crossing the last gap distinguishes highly skilled and qualified mediators from others in the practice.

4. INTERNAL AND EXTERNAL PRESSURES TO ACHIEVE SETTLEMENT

There are internal and external pressures within the mediation discipline to achieve favourable settlement rates. Two of these pressures will be discussed: the use of settlement rates as selection criteria for mediators; and justification for publicly funded mediation services.

⁴⁷ Jean Poitras, “Strategies for Diffusing Hostility in Mediation” (March 2007) Conflict Resolution Today. 26.

⁴⁸ *Ibid.* at 27.

⁴⁹ Genevieve A. Chornenki & Christine E. Hart, *Bypass Court: A Dispute Resolution Handbook*, 3rd ed. (Markham: LexisNexis Canada Inc., 2005) at 124.

Settlement Rates as Selection Criteria

The business of mediation is highly competitive. Disputants may choose mediation as a dispute resolution method because of the benefits of the process. But the process is undertaken with the view that it will lead to a specific outcome: settlement. Mediators have incentive to demonstrate to prospective clients their capability to facilitate this outcome. Those seeking mediation services come across messages in the media that this is a piece of information they should inquire about.⁵⁰ Cinnie Noble in *Family Mediation: A Guide for Lawyers* suggests that when researching mediators, counsel should ask: “How many family cases have you mediated in the past year? How many of these settled in finality or on an interim basis?”⁵¹ Settlement rates can, in this regard, become a selection criteria for lawyers or prospective clients trying to choose a mediator. In response to this demand, some mediators include settlement statistics among their advertising materials, although these are subject to Canadian Bar Association guidelines. The Canadian Bar Association Model Code of Conduct for Mediators specifies that mediators “shall refrain from guaranteeing settlement or promising specific results.”⁵²

Justifying Publicly Funded Services

Effectiveness of mediation is also subject to scrutiny in the public sector. In affiliation with the Family Court in Ontario, voluntary mediation services are available on-site at the court facility, and at off-site locations.⁵³ This is a publicly funded service delivered by an external provider operating within a government contract. Publicly funded services often bear the onus of

⁵⁰ Michael Roberts, “Choosing the Right Mediator: A Guide to Effective Mediator Styles” www.mediate.com.

⁵¹ *Supra* note 32 at 60.

⁵² Canadian Bar Association – Ontario ADR Section, “Model Code of Conduct for Mediators” (April 1998).

⁵³ *Supra* note 6 at 15.

demonstrating effectiveness in order to justify continuation of the funding stream. One key objective of the court-connected mediation services of the Family Court in Ontario is to reduce caseload volume in the court system.⁵⁴ This objective is not fulfilled when cases initiate court proceedings, and are referred to mediation, but re-enter the court system unresolved. In “Recapturing and Renewing the Vision of the Family Court,” Mamo, Jaffe and Chiodo propose recommendations for modifications to the delivery of court-connected mediation services.⁵⁵ One of these is to establish clear objectives for the services, and to have an independent review to measure their effectiveness.⁵⁶ Integrated with the first recommendation is a second recommendation, which is to apply a standard method to track cases in the court system that partially or completely settle through mediation. The timing at which settlement occurs should also be tracked. This data will assist in identifying the impact of the service on judicial caseloads.⁵⁷ The recommendations highlight the strong interest in settlement outcomes of mediation, and how these relate to fulfillment of program objectives. I would argue that if providers of the service are aware that these outcomes will be measured, this will increase the pressure to deliver settlement rates in line with benchmarks. Concerns about the consequences if mediation services do not yield the expected outcomes will add to this pressure.

⁵⁴ *Supra* note 6.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at 47.

⁵⁷ *Ibid.* at 50.

5. ATTRIBUTION BIASES

The fifth factor affecting achievement of settlement in mediation is attribution biases. Russell Korobkin, Professor of Law at UCLA, has explored theories behind psychological barriers relevant to mediation.⁵⁸ In “Psychological Impediments to Mediation Success: Theory and Practice” Korobkin defines success as achieving settlement.⁵⁹ One impediment he focuses on is attribution biases, and advances a theory relating to these biases and their impact on mediation. People can choose to attribute a negative event to situational characteristics that define the event, or to dispositional characteristics related to the individual responsible for the event.⁶⁰ Emphasis on dispositional as opposed to situational factors to explain an event can create an attribution bias, which has been referred to in social psychology research as a “fundamental attribution error.”⁶¹ While situational factors are generally beyond the control of the perpetrator, we assume that dispositional factors are controllable.⁶² The harm a person experiences is heightened if he believes it was within the wrongdoer’s control.⁶³ Dispositional attributes of negative events tend to elicit anger.⁶⁴ Korobkin proposes a mechanism called “malevolent utility function” to explain the correlation between anger and lack of a successful mediation outcome. A disputant who has malevolent utility function looks to prevent the other party from achieving his desired outcome in a dispute.⁶⁵ Thus, dispositional attributions

⁵⁸ Russell Korobkin, “Psychological Impediments to Mediation Success: Theory and Practice” (2005) 21 Ohio St. J. on Disp. Resol. 281.

⁵⁹ *Ibid.* at 282.

⁶⁰ *Ibid.* at 299.

⁶¹ *Ibid.* at 302.

⁶² *Ibid.* at 299.

⁶³ *Ibid.* at 300.

⁶⁴ *Ibid.* at 299.

⁶⁵ *Ibid.* at 301.

ultimately lead to a desire to vindicate, and the likelihood of parties reaching settlement is reduced.⁶⁶

Effect of an Apology

Given this dynamic, what preventive measures can mediators take? One remedy suggested by Korobkin is to ask disputants to explain the reasons behind their actions to one another, and in doing so, shift the dialogue away from blame. The mediator can draw attention to situational constraints that were part of the wrongful act. If the wrongdoer explains the behaviour, and offers an apology that conveys acceptance of responsibility, this may help to dissipate anger.⁶⁷ The effects of apology on settlement have been investigated by other researchers. There is some evidence that apologies can influence attributes of responsibility for an incident, perception of the wrongdoer, and expression of anger.⁶⁸ An apology that includes acceptance of responsibility for the harm incurred has been observed as particularly effective.⁶⁹ How this translates specifically to settlement in mediation is less clear, as systematic investigation of this area is limited. Jennifer Robbennolt, Associate Professor of Law at the Center for the Study of Dispute Resolution, University of Missouri, proposes that research should be directed at the underlying attributions of disputants to better understand the impact of apology on settlement.⁷⁰ She theorizes that "... an apology might operate to influence settlement

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at 306.

⁶⁸ Jennifer K. Robbennolt, "Apologies and Legal Settlement: An Empirical Explanation" (2003) 102 Mich. L. Rev. 475.

⁶⁹ *Ibid.* at 480.

⁷⁰ *Ibid.* at 481.

decision-making by altering the injured party's perceptions of the situation, the other party, or the offer itself."⁷¹

Attributions as an Agent of Transformation

Felstiner, Abel and Sarat offer additional support for positive change in their article "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...".⁷² They refer to attributions as an agent of transformation in a dispute.⁷³ A dispute can be transformed in the view of a disputant, either positively or negatively. The authors submit that attributions relating to an injurious event are not fixed, but can be changed as new information, insight and experience become available. This alters the moral coloration of an injurious event. Attributions are then changed, and can shift the party's perception of the event.⁷⁴ It is worth considering the practical application of this theory. If a mediator guides communication between the parties such that the moral coloration of a hurtful event is lessened, will the other party's attributions change to allow productive mediation?

Theories relating to attribution biases, and their impact on impeding settlement in mediation, help us build strategies for progressing to agreement. The theories discussed in this section underscore the importance of accurately diagnosing the source of conflict between participants in mediation.

⁷¹ *Ibid.*

⁷² William L.F. Felstiner, Richard L. Abel & Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." (1981) 15 *Law and Society Rev.* 42-65.

⁷³ *Ibid.* at 50.

⁷⁴ *Ibid.* at 52.

CONCLUSION

Disputants undergoing family mediation place significant value on achieving settlement. In this paper I have discussed five factors that either foster this outcome, or hinder it. These are summarized as follows. Participation in mediation prior to involvement in court proceedings may increase the likelihood of settlement. Lawyers representing clients involved in mediation can take positive measures to influence the achievement of settlement. Highly skilled and qualified mediators can guide clients through impasse toward resolution. There are strong incentives within the discipline of mediation to strive for competitive settlement rates. And lastly, theories behind attribution biases help us understand and address the causes of conflict that can prevent reaching settlement. Having an awareness of these influences may help parties to mediation achieve their desired outcomes.