

Mediation Strategies: Breaking Impasse

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One of the hallmarks of experienced and savvy mediation practitioners is that they are not afraid of impasse. They know that a good mediator is going to do everything in his power to break the impasse in order to consummate a settlement. If your opponent fears impasse and you don't, chances are, you will win at the negotiating table. This article will touch on some of the methods of breaking impasse used by capable mediators - and how to use them to your advantage.

1. *Using the Mediator to Float Settlement Balloons.*

One of the most commonly used methods of breaking impasse is for the mediator to float "unauthorized" proposals to both sides. "If the other side will move from their last position, will you?" is the scenario often posed by the mediator. Of course, if this is the methodology which led you to impasse in the first place, it's time to look for other alternatives. So let's look at some other means of getting the parties past the sticking point.

2. *The Carry-Over Dialogue.*

Just because the mediation has formally come to an end without agreement being reached does not mean all hope for a settlement is lost. A diligent and motivated mediator will stick with it, following up with the parties to see if further progress can be made. If the mediator doesn't take the initiative to follow up on his own, don't hesitate to prompt him into action by privately expressing an interest in further dialogue. The mediator should take the opportunity to see if the other side would be open to further negotiations, whether by telephone or by convening another mediation session.

3. *The Mediator's Double-Blind Proposal.*

Once the parties and the mediator have tried everything in their power to come together and have failed, the mediator may determine that the environment is conducive to a "mediator's proposal."

The double-blind form of the mediator's proposal works essentially as follows. The mediator prepares a settlement proposal based on his best assessment of the terms most likely to be accepted by both sides. It may or may not represent an even compromise between the parties' last positions. Depending on the situation, it may be as simple as a number written on a scrap of paper, or a detailed analysis of the reasons each party should accept the stated proposal.

The mediator submits the terms of his proposal to each side. Depending on time constraints and other factors, the mediator's proposal may be done immediately at the point of impasse or in the following days or weeks. Each party is instructed to indicate their acceptance or rejection of the mediator's proposal. The mediator explains that if **both sides** accept the proposal, the mediator will announce a settlement. If **either side** rejects the proposal, the mediator will announce that there is no settlement. Neither side will be told how the other responded. In this fashion, only if the parties **both** agree on the proposal, will each know the other's true

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position. (Obviously, if one accepts and no settlement is achieved, that party knows the other side has rejected the proposal, but not *vice-versa*).

A word of caution: this impasse-breaking device is often perceived as a last ditch effort to find a number the parties can both agree upon. If the mediator fails to accurately assess the parties' positions and hit "the number" both sides will accept (if there is one), the mediation will most likely fail.

4. *Med-Arb. and its Variations.*

Med-arb., as it sounds, is a

combination of mediation and arbitration. I often get parties who have been ordered to participate in non-binding judicial arbitration to agree to this procedure.

Very simply, the parties participate in the normal mediation process. If they are unable to reach a mutually agreeable resolution, the mediator becomes an arbitrator and renders his decision. In court-ordered cases, the result is non-binding, and thus may be challenged. The parties may use the same process, however, to break any mediation impasse. In this scenario, both sides agree to accept whatever number or terms are chosen by the mediator, with the understanding being that the award will represent some form of compromise between the parties' last positions.

Baseball arbitration is another twist on the same theory of breaking impasse. However, instead of allowing the arbitrator leeway to come up with any resolution or compromise he sees fit, he is instead required to choose one of the submissions made by the parties. He may not compromise. By this method, both sides are discouraged from taking overly extreme positions which would likely be rejected by the arbitrator in favor of the other side's more reasonable position.

High-Low Partial Settlements are one method of "ending" cases whose final resolution is premature. Sometimes the parties are simply not in a posture to settle at a given point in time. A dispositive or highly significant event may be approaching, and it hampers the ability of the parties to fully settle the case. The high-low agreement may be one available alternative to "bracket" the case value, and

achieve finality based on the outcome of a future event. For example, suppose the defendant has a motion pending for summary adjudication of certain significant liability issues, say the duty to defend in a coverage dispute. The parties realize that the outcome of the motion will not dispose of the case entirely, but will have a dramatic effect on its settlement value. Neither side is willing to compromise to a significant degree until the motion is ruled upon. One solution: negotiate a high-low settlement premised on whether the motion is granted or denied. Granting of the motion sees the case settled at the lower number, while denial results in acceptance of the high number.

Random chance methods of breaking impasse can also be successful given the right scenario. In one case involving substantial dollar figures, the parties broke a \$200,000 impasse by cutting a deck of cards. The senior counsel of my former firm actually pulled the ace of spades out of the deck, obviating the need for his opponent to even take a card. Clearly, in that particular dispute the money was less a motivating factor to the parties than in most negotiations. The point, however, is that the means of breaking impasse are limited only by the imagination of the parties and the mediator.

CONCLUSION

Parties who fear impasse may be unwittingly letting that concern stand in the way of negotiating the best possible settlement for themselves and their clients. Skilled mediation practitioners instead will realize that impasse does not necessarily equate to a termination of the negotiations. The next time

you're headed toward impasse in a mediation, instead of giving up or altering your strategy, use the tools available for breaking that impasse in order to achieve the best possible settlement for your client.

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This article was originally published in the Los Angeles Daily Journal (June 30, 1999).