

# Breaking Impasses

## In Settlement Conferences

~ Five Techniques for Resolution ~

by Morton Denlow

Being able to break impasses between parties is often the true test of a judge during settlement conferences. First, a judge must evaluate the situation to determine whether the deadlock can indeed be overcome or whether it should be permitted to remain. If the stalemate exists because information is lacking or settlement authority has not been extended to the parties present, the judge will want to allow additional time to achieve a successful resolution. If the impasse is a result of honest differences between the parties or a matter of negotiation strategy, a judge can use a number of techniques to affect the standstill and ensure speedy and satisfactory progress for the parties.

To achieve settlement, a judge should not be afraid to adopt an active role. He or she may need to shift from the position of a neutral facilitator who serves as a catalyst to help the two sides communicate to the position of an active participant who suggests possible settlement terms and voices an opinion about

the feasibility of settlement. This involves discussions of monetary considerations including the overall costs of litigation and the relative risks to the parties. Granted, before taking this step, the judge must clear it with all parties involved. Usually, however, if the parties truly desire to settle, they will appreciate this proactive stance, welcoming one of the five approaches that are discussed below. Each technique is considered distinctly, but the judge can combine and/or tailor them to achieve settlement in the individual scenario at hand.

### CREATING A RANGE

Parties typically are not in the same ballpark when they initially exchange settlement proposals. This is sometimes due to legitimate differences in their evaluations of the case's merits. These differences result in a desire to negotiate aggressively, with the lawyers hoping to achieve better results for their clients and fearing the relinquishment of too much too

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soon. A judge, having listened closely to parties who have expressed a sincere desire to settle but who, despite extensive negotiation, still find themselves in two different ballparks, can employ a “creating a range” technique to determine whether settlement is possible. The following case study demonstrates how this can be applied.

### **Case Study 1: The Leaky Building**

The plaintiff’s condominium association filed suit against the defendant contractor, alleging the contractor improperly applied an exterior waterproof coating to the concrete building, resulting in water damage. In the complaint, the plaintiff sought \$2 million in damages. Pursuant to my standing order requiring parties to exchange written demands and offers before the settlement conference, the plaintiff had demanded \$1,700,000 and the defendant had offered \$50,000.

The initial settlement conference, in which I played a strictly facilitative role, resulted in slight progress. By the end of the session, the plaintiff had reduced its settlement demand to \$1,125,000 and the defendant had increased its offer to \$350,000. The parties then agreed that an additional exchange of information and discovery would be useful before engaging in a second settlement conference. We convened a second settlement conference several months later, again with little progress after several hours. The defendant authorized me to communicate a new offer of \$500,000, to which the plaintiff responded with a reduced demand of \$1,100,000. In separate caucuses, each party stated it was approaching its limit.

In a joint session, I informed the parties of the apparent impasse created by the \$1,100,000 demand and the \$500,000 offer. I asked them if they would permit me to suggest a settlement

range to determine whether it made sense to continue negotiations. I insisted that this process would be governed by the following ground rules: (1) the settlement range would be explained to the parties in a joint session; (2) each party would then meet separately outside of my presence to discuss whether it would be willing to continue discussions in the suggested range; (3) each party would respond to me separately on a piece of paper indicating “yes” or “no”; (4) if either party responded “no,” the conference would immediately terminate; (5) if both sides answered “yes,” negotiations would continue; and (6) it would not be disclosed that one party responded “yes” unless both sides responded in the affirmative.

After both parties agreed to this approach, I recommended a \$200,000 range of \$650,000 to \$850,000, large enough, I hoped, to attract both sides, but small enough to make settlement feasible. I explained to the parties why this range made sense for business and financial reasons, summarizing many of the points we had discussed in the separate caucuses.

The range took into account information learned from the parties that could be justified to both sides. The \$200,000 range made settlement feasible if both sides responded “yes.” It would not have advanced the process significantly if too large a range was suggested, say \$550,000 to \$1,050,000. Similarly, it was premature to offer the parties a single number because they were too far apart, and neither side had expressed a desire to make a substantial move. A specific figure would have likely led to a rejection by at least one side and could have prematurely terminated discussions. The proposed range of \$650,000 to \$850,000 tested whether the plaintiff was prepared to settle for less than \$1,000,000 and whether the defendant would move significantly toward

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\$750,000. This would determine whether the parties had the flexibility that could lead to a settlement that day.

The parties went to separate rooms to discuss the range. After approximately ten minutes, each delivered a “yes” on paper. I then brought the parties together and informed them of the positive responses. We continued to negotiate and settled at \$725,000 within forty-five minutes, complete with a payment schedule and security. In the event that one or both sides had responded “no,” I would have explained that because both sides had not agreed to proceed, the talks would terminate for that day. At no time would the fact that one party said “yes” be disclosed.

This procedure creates a no-risk environment for both sides. If the parties are truly firm at their prior figures, the settlement conference terminates without wasting any more time. If only one party is prepared to negotiate within the range, it is not prejudiced in its negotiating position. Given the no-risk nature of the process, parties are quite receptive, particularly where a substantial chasm exists.

This method of breaking an impasse provides the following advantages: (1) it saves time, (2) it preserves the parties’ settlement postures in the event the range is not agreed upon, (3) it does not commit the judge to a specific number, (4) it leaves the parties in control of the settlement process, and (5) it requires the parties to seriously consider whether to proceed or terminate the settlement process. This approach is recommended primarily in cases with large dollar amounts where significant gaps still exist after lengthy negotiations.

One disadvantage is that this technique can lead to termination of settlement discussions and

therefore should not be used until a clear impasse exists. As long as the parties are making substantial movement, setting a range is not needed. Also, creating a range that appears weighted heavily toward one side may anger the other. Finally, because both parties must agree to the process before it is implemented, either side can veto the process and prevent its use, which may be viewed as either an advantage or disadvantage.

## **RECOMMENDING A SPECIFIC NUMBER**

Although any settlement conferences are always begun as a facilitative mediation, I am not reluctant to suggest a single settlement number when an impasse arises and both parties desire my input. The following case study demonstrates this technique.

### **Case Study 2: An Employment Discrimination Claim**

The plaintiff filed an action alleging a violation of the Americans with Disabilities Act for wrongful termination and retaliatory discharge. Although the plaintiff had been employed by the defendant for thirteen years with a fairly good work history, since her termination she had been out of work for two years and was unable to find a comparable job. Based on itemized damages of \$60,000 in back pay and \$15,000 in front pay, plus attorneys’ fees, the plaintiff had made a written settlement demand before the settlement conference of \$75,000 and reinstatement. The defendant had responded with a \$5,000 settlement offer. The case was in the early stages of discovery when we held the settlement conference.

Limited progress was made during the several hours of joint meetings and separate caucuses. The defendant evinced no interest in reinstating

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the plaintiff, and the parties were left with a discussion of money. The case did not appear suitable for summary judgment because a clear factual dispute existed regarding what was said at the time the plaintiff was terminated and the reasons for her termination. We reached an impasse after the plaintiff reduced her demand to \$65,000 and the defendant increased its offer to \$20,000. In separate caucuses, the parties clearly stated they would not budge.

In a joint session, I explained that neither party seemed interested in continuing negotiations but that I would recommend a settlement figure if they wished. As with the “creating a range” case, I had specific conditions: (1) the suggested amount would be explained to the parties in a joint session along with the rationale for why the number should be considered reasonable by both sides; (2) the parties would have three business days to consider the recommendation; (3) by the close of business on the third day, they would each send me a fax with a one-sentence acceptance or rejection of the recommendation; (4) if only one side accepted, the other would not be advised of this; (5) we would discuss all other settlement terms (e.g., releases, dismissal of litigation, confidentiality, etc.) before the number would be disclosed; and (6) both parties must consent to the process before proceeding. After several minutes of private conferences, both parties agreed to proceed. We then promptly resolved the standard settlement issues, leaving only the dollar amount for resolution.

I recommended that the parties settle the case for \$45,000, explaining that my reasoning was based on issues such as litigation risks, litigation costs, and other factors that had been discussed in separate party caucuses. After presenting a balanced explanation, I instructed

the parties that, while neither was happy with the number, they should take several days to consider it and advise me of their decision. Three days later, both parties faxed acceptance of the recommendation and the case was settled.

When monetary differences are small, it may be useful to take advantage of the momentum created and require immediate responses from the parties at the conference. However, where the differences are substantial, an additional three days to reflect on the court’s recommendation helps facilitate agreement in many cases.

This method also gives the parties a no-risk opportunity to settle. Because they are not required to accept the number, they can reap the benefit of a judge’s recommendation without compromising their settlement positions. In this example, if the plaintiff had accepted the recommendation and the defendant had rejected it, the plaintiff’s bargaining position would have been protected. The defendant would not have discovered that the plaintiff was willing to accept \$45,000, and would only have known that the plaintiff’s last demand was \$65,000.

This technique is particularly useful when one side does not wish to exercise its settlement authority at the settlement conference and would prefer to discuss the judge’s recommendation with the powers “back home” before making a final decision. Although my standing settlement order requires parties present at the conference to have full settlement authority, and although I confirm this during opening comments, designated representatives are sometimes reluctant to exercise that authority for fear of how they will be perceived at their offices. Parties often appreciate the judge making a recommendation, which can

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carry considerable weight in the deliberations. The procedure is optional; therefore, it should be made clear to the parties that the judge will not suggest a number if they do not both want to hear it.

This method is not without disadvantages. If the court does not make a clear presentation explaining why the suggested dollar amount should be considered by both sides, a party may perceive the judge as arbitrary or biased. A recommendation that focuses on the costs of litigation and the risks involved enables the judge to make a recommendation while avoiding any specific prediction as to the outcome.

My experience tells me that this process is effective in breaking impasses approximately 50 percent of the time. Even though the parties are deadlocked at the conference itself, the additional time to reflect and the court's input assist the parties in taking a second, perhaps more sober, look at their case.

### SPLITTING THE DIFFERENCE

Parties frequently reach a stalemate while relatively close to a settlement figure. Under these circumstances, where no objective basis exists for recommending a specific number, splitting the difference may overcome the deadlock. The questions of when, who, and how to raise the topic of splitting the difference creates a number of possibilities. The following two examples illustrate the "splitting the difference" technique to achieve a settlement, the first by means of separate caucuses and the second in a joint session.

#### **Case Study 3a: A Civil Rights Case**

The plaintiff, an attorney, filed a civil rights action for false arrest and malicious

prosecution, claiming that police officers had planted narcotics on him while he was in the lockup on an unrelated charge. The drug charge was ultimately dismissed, and the plaintiff sued the officers.

The plaintiff's initial settlement demand of \$75,000 had been countered by the defendants' initial offer of \$20,000. In the course of conference shuttle diplomacy, the plaintiff subsequently reduced his demand to \$50,000 while the defendants increased their offer to \$30,000. At that point, both sides stood firm.

When I evaluated the position of each party, I assumed that the plaintiff might be willing to move further, having come down from \$75,000 to \$50,000. In a separate caucus, the defendants had shown only a slight willingness to move upward from \$30,000. Based on this, \$40,000 appeared to be a number that should seriously be considered by both sides. In a separate meeting with the plaintiff's side, I asked them to consider splitting the difference at \$40,000, to which the plaintiff agreed. The attorney did not want this fact revealed to the defendants unless the defendants were also willing to pay \$40,000.

In a separate meeting with the defendants' side, they were advised that I had requested the plaintiff to seriously consider \$40,000 and was now asking them to do the same. The defendants also agreed to pay \$40,000 but did not want this fact revealed unless the plaintiff would accept it. The defendants authorized me to advise the plaintiff that they would pay \$40,000, but only after the plaintiff confirmed he would accept the \$40,000. After I returned to the plaintiff's camp, he once again confirmed his willingness to accept \$40,000. At that point, the plaintiff was informed that we had a deal, and the defendants were brought back in to

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summarize the settlement terms.

The principal advantages of discussing the concept of splitting the difference in separate caucuses are: (1) it avoids one party revealing to the other that it is willing to split the difference unless both parties have agreed, thus preserving the parties' settlement positions in the event no agreement is reached; (2) it reflects an attempt at compromise raised by the judge by which both parties can save face; and (3) if one party makes it clear that it will not split the difference, the court is free to shift gears to adopt a different strategy.

However, splitting the difference has the danger of placing the judge in the position of recommending a number that may alienate one of the parties. Therefore, when raising the possibility of this approach, it is generally helpful to frame the discussion to each side separately as, "What would your reaction be if the *other* side would agree to split the difference?" In this way, the number does not represent a recommendation by the court; rather, it is a testing of each side's readiness to compromise.

### **Case Study 3b: An Employment Discrimination Case**

In this case, the plaintiff brought an action alleging wrongful termination due to racial discrimination, seeking back pay of \$50,000, compensatory damages of \$25,000, and attorneys' fees of \$20,000. Before the settlement conference, the plaintiff had made a settlement demand of \$70,000, to which the defendant had offered \$22,000.

During the settlement conference, substantial progress toward settlement was made. The plaintiff's demand was gradually reduced to \$40,000 while the defendant's offer increased

to \$30,000. At that point, both sides were able to agree on nonmonetary issues, converting the termination to a resignation and reinstatement, and cleansing the plaintiff's personnel files. However, there was no further movement on money. In a separate caucus with the defendant, the defendant's representative revealed that he did not have authority to move beyond \$30,000, despite my standing order requiring full authority. Both parties desired to settle, but neither side would, or could, budge.

The parties were brought together in a joint session to review the progress we had made on both the financial and nonfinancial issues. After asking the parties if they would like my recommendation on the financial issues, both consented. I recommended they split the difference, to which both sides promptly agreed, with a commitment by the defendant's counsel to recommend the amount to his superior and an expectation of final approval by the next day. Approval was received and the case settled for \$35,000.

When a relatively small amount is involved and one of the parties appears not to have full authority to settle, splitting the difference based on the court's recommendation in a joint session enables the party to go back and assure the decision maker that the case will settle if the party goes along with the court's recommendation. The judge has persuasive powers in urging a compromise over small differences. By suggesting the parties split the difference, both sides save face.

If one party agrees and the other does not, the party who agreed may feel taken advantage of. Therefore, this method should be used only where the differences that separate the parties are quite small. It is one thing to let the other side know you are willing to split the difference

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between \$30,000 and \$40,000 but something else to agree to split the difference between \$1 million and \$3 million when the other side fails to reciprocate.

### **CLARIFYING OBJECTIVE FACTS**

Many times differences in settlement demands and offers reflect distinctions in the respective parties' versions of the facts. To the extent that the issues involved are subjective - for example, parties' disagreement as to what was said in a particular conversation - it is difficult to bridge the gap. In these instances, focusing the parties on how a jury would perceive the issue is very helpful, allowing them to factor this into their litigation risk rather than trying to persuade them to agree on who is right and who is wrong.

Sometimes differences exist because of a misperception of an objective fact by one side. The following example shows how clarifying an objective fact can break an impasse.

#### **Case Study 4: A Pregnancy Discrimination Claim**

The plaintiff claimed that she had been wrongfully terminated because she was pregnant. The defendant contended that the plaintiff was terminated because of substandard performance on the job and excessive absenteeism.

Based on monetary damages of approximately \$6,500, the plaintiff had made a demand for \$10,000 before the settlement conference, which was countered by the defendant's offer of \$3,000. During the settlement conference, the parties reached an impasse when the plaintiff's demand was reduced to \$6,500 and the defendant's offer stood firm at \$5,000. In separate meetings, a dispute arose regarding

whether the plaintiff had received \$500 in unemployment compensation.

The parties came together to discuss whether the plaintiff had in fact received \$500 in unemployment compensation. Once the plaintiff acknowledged that she had previously received the \$500, she reduced her demand to \$6,000 and the defendant promptly agreed to settle.

Where differences between the parties depend upon a determination of an objective fact, bringing the parties together to focus on the disputed issue makes sense and frequently leads to resolution. I can think of no disadvantages to focusing on objective facts as a means of limiting differences and breaking impasses.

### **SETTING FIRM DEADLINES**

Negotiations have a way of accelerating as parties near an imposed deadline. In the initial explanation of the settlement conference process, I generally inform the parties of any time constraints. Settlement conferences are normally scheduled for no longer than two or three hours, and parties are told at the start what time I will end the meeting. In some cases, knowledge of a deadline causes the parties to move more expeditiously toward settlement. The following scenario illustrates this point.

#### **Case Study 5: A Breach of Contract Action**

The plaintiff filed a breach of contract action arising out of a management agreement to operate five separate golf courses, to which the defendant filed a counterclaim alleging fraud and breach of contract. The parties had a total dislike for one another and had engaged in extensive discovery.

The settlement conference commenced at 2:30

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p.m., and I informed the parties that I would leave no later than 5:15 p.m. to meet a family commitment. During the afternoon, little progress was made even though both sides expressed a strong desire to settle. Seven issues required resolution, and by 4:30 p.m. we had resolved exactly one.

At that point, I once again emphasized my intention to leave at 5:15 p.m. In the next forty-five minutes, we resolved all but one issue, on which both sides refused to budge. It seemed unlikely the parties would let a settlement fall apart over this one issue. I brought the parties together and told them that they were both being unreasonable regarding the final point. As I left, I explained that they were free to use my courtroom to continue their discussions and that they should leave a note regarding the outcome. The next morning I found a note indicating the case was settled.

Judges almost always have the pressure of a backlog of other cases and rarely have the luxury of setting aside days or weeks to devote to the settlement of one case. Therefore, setting a deadline becomes necessary to control one's docket and to schedule other matters. In addition, setting a firm deadline causes parties to become more serious in their discussions, similar to the way setting a firm trial date

accelerates settlement talks. Applying a deadline is most effective when many major issues have been resolved and only minor ones remain, as parties are reluctant to see a settlement fall apart on minor matters.

On the other hand, parties may feel undue pressure when facing a deadline. This can lead to buyer's remorse and difficulty in consummating the settlement. In addition, a deadline may result in a failure to settle cases that could otherwise be settled if additional time were available. In these situations, a converse approach may be effective. If the judge informs the parties that he or she is willing to work late through dinner, things can start to progress quickly as dinner time approaches.

## **CONCLUSION**

The vast majority of civil cases settle, and judges are becoming increasingly involved in that process. Judges must be aware of techniques to work through stalemates to assist parties in achieving settlements. Giving up hope simply because the parties appear to be at a standstill is usually not the proper course. Judiciously taking advantage of impasse-breaking techniques can only help result in mutually satisfactory settlements for all parties.