



New Impasse-Busting Techniques – Part 2

By Bruce Friedman, Esq.
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I have recently discovered some additional, impasse-busting techniques for your consideration when the negotiating process grinds to a halt.

The Mediator's Bracket

This is a useful technique in both early and late stages of a mediation. In the early stage, the parties remain too far apart for distributive bargaining to gain any traction. Here, you have defendants saying that if the plaintiff stays above X dollars, we are just not going to offer much. On the other hand, the plaintiff is saying that the defendants have to offer at least a seven-figure number or they are not going to get anywhere today. *Voilà*: the mediator's bracket. No one owns the numbers, just the mediator. The mediator proposes high and

low numbers that neither party has offered or demanded. For example, the numbers may be pretty far apart (\$5 million and \$500,000 or \$4 million and \$1 million), but this works when the parties were at, for example, \$8 million and \$225,000, and were not willing to move with that much distance between them.

Buy-in by the parties will bust the impasse and allow for an increased pace of negotiation. Like all impasse-busting techniques, even if the parties reject its use, discussion of the technique and the mediator's proposed bracket will prompt a very helpful discussion

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in terms of where the parties may be willing to go and a bracket that might work. Late in the mediation, the parties should be able to propose their own brackets with some mediator consultation, but the mediator's bracket could be used as a means of closing a settlement as well.

Baseball Mediation

If the thought of this one gives you the chills, you already get it! Here, the parties have been at it all day, but neither is willing to compromise further in order to close the deal. Here we go! The mediator proposes that each side pick a number and the mediator picks a number. Each side and the mediator writes the number on a piece of paper. All agree that the mediator will choose the settlement number closest to what she has written down as the mediator's number. Hopefully, this process pushes the parties to pick a number between the last offer and counter. But the mediator has to pick one of the party's numbers and not a compromise figure. This is a controversial technique as it moves the mediator from

facilitator to decision maker. It is not for the faint of heart and could leave a party feeling burned by the mediator. On the other hand, it is not that different from a mediator's proposal with the exception that the parties have agreed in advance to accept it.

The bottom line: be creative and constructive, stay optimistic and settle! •

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