



MEDIATION IMPASSE-BUSTING TECHNIQUES

By Bruce A. Friedman, Esq.

There comes a time in every mediation when negotiations reach an impasse. Negotiations can stall at the outset of a mediation when the parties are unwilling to bargain with one another either because “it is the other side’s turn,” “we won’t respond to that outrageous demand” or “we won’t accept that insulting offer.”¹ Later in the mediation, impasse may occur when either party perceives that the other side is not negotiating in good faith, which means that one side has stopped matching moves with the other and has reached the bottom line, or their “limit of authority.”

For whatever reason an impasse occurs, mediators must provide the parties with the tools necessary to break the deadlock and move discussions to the zone of agreement. This is the point at which the parties have narrowed the playing field and can negotiate to closure.

Effective impasse-busting techniques include the following:

1. Ranges: This is useful when the parties are far apart and not at a place where they want to make a specific offer or demand. It involves the mediator asking each side whether they are willing to settle the case in a range of numbers—i.e., high six figures, low seven figures, etc. If parties accept the mediator’s suggested range, the negotiations continue in that range. The use of the range has brought the parties closer together. One party may be willing to say that it would settle in the high six figures if the other party would be willing to settle in the low six figures. This coupling of brackets with ranges is used when the parties are uncomfortable choosing a specific number to offer or it is too early for the parties to negotiate within a smaller range suggested above.

2. Brackets: This is employed when a party is reluctant to go to a number unless the other side is at a level that will produce a settlement in the midpoint of the brackets. For example, a party may say that they are only willing to offer

\$1 million if the plaintiff is at \$3 million. Brackets are an effective tool to close the gap when progress in trading demands and offers has narrowed but has not reached the zone of agreement.

3. Joint sessions: A joint session between the mediator and counsel, the parties or both is an effective impasse-busting technique, particularly if a party feels that the other side “just doesn’t get it” and that the mediator is “not making them understand the weakness of their case.” The mediator’s role in the joint session is to focus the discussion and make it a problem-solving meeting, after which negotiations will hopefully resume.

4. Negotiating with the mediator: This technique is used throughout the mediation by a skillful mediator for a variety of reasons. As an impasse-busting technique, however, it is used later in the mediation to allow parties to open up and let the mediator know what they would accept or pay to settle the case. The overriding condition of such a discussion is that the numbers will not be disclosed to the other side. The mediator can then have a similar discussion with the other side and, armed with the information, guide the parties to the zone of agreement. This technique requires that the parties trust the mediator. Therefore, it is usually used after the mediator has engaged with the parties and counsel long enough to gain their trust.

5. The conditional offer: This is a closing technique used when the parties have reached the zone of agreement but a party does not want to be responsible for a specific offer. Instead of communicating an offer, the mediator will say something like, “If I could get the defendant to

¹ Phrases in quotes throughout this article are heard in almost every mediation. No offense intended if you find, as you will, that you have uttered these phrases.

pay \$500,000, would you take it?" Even if the conditional offer is rejected, it often produces very useful information about the parties' bottom lines.

6. The mediator's proposal: This is a closing technique in which the mediator proposes a specific figure to both parties and asks them to either accept or reject the proposal. The response of one party is usually not shared with the other unless they both accept. The proposal can remain open until the end of the mediation day, a few days or even a week, at which point it must be accepted or rejected. The mediator's proposal should only be used if the mediator believes that the parties will stretch to accept it. Premature use of the mediator's proposal is ineffective and may be counterproductive in putting a settlement value on the case that may be too far from a party's own valuation of the case. ■

These are some techniques in the mediator's toolbox for addressing the inevitable impasses that occur in every mediation. Using the right technique at the right time is the art of mediation. A welcome attribute of all of the techniques is that discussing their use with a party in and of itself can be impasse-busting in that it provides the mediator with very valuable information about the party's goals in concluding a successful mediation.

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