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How to avoid impasse in settlement negotiations

By Patrick J. Mahoney

Mediation is a facilitated negotiation that enables parties to explore settlement in a confidential setting. A successful mediation requires preparation and an understanding of the process so as to avoid impasse, the breakdown of the process. No matter how careful and prepared the mediator, attorneys and parties are, impasses can still happen. It is helpful to understand why they occur and ways to resolve them so as to reach a successful settlement.

The consequences of impasse in mediation can be significant and severe. If a case does not settle, the result of any one trial is anecdotal information. There is, however, a study of more than 9,000 settlement decisions that found that 61 percent of the time plaintiffs recovered less than the last pre-trial offer and 24 percent of the time defendants paid more. Plaintiffs' errors cost on average $43,100 and defendants' $1,140,000. Errors increased in contingent fee cases and where insurance was not available, factors consistent with the established finding that parties take greater risks when they have something to lose.

Impasse arises from a failure of communications, poor negotiating skills, lack of information, emotional investment in a principle, disagreement over likely results, lack of authority, or a need for an authoritative ruling. The latter need results in impasse. The other impediments are overcome by facilitating communications, the exchange of information and focus on the parties' positions and needs. Outcome disagreements are reduced by exploring the best and worst outcomes. Emotional responses are acknowledged and thereby overcome. Lack of authority requires bringing the right person to the table. There are also ways of proceeding with mediation that can both prevent and overcome impasses.

Questions and tasks: Mediators use facts and logic to cause the parties to reexamine perceptions and inconsistencies. The mediator acts as a reality check challenging assumptions about the persuasiveness of witnesses or documents. Costs and risks are highlighted. The parties are urged to consider future opportunities rather than the past.

Common techniques engage the parties in an effort to overcome impasse.

- » Formulating strategies to move the negotiations.
- » Focusing on the other side's likely response.
- » Developing criteria for a good settlement.
- » Examining worst case scenarios.
- » Reviewing objective data such as jury verdicts or settlements of comparable matters.

Blind bidding: The parties submit confidential "final" offers with agreement as to how the offers are to be treated:

- » If the difference is X, the mediator discloses the offers and negotiations continue or the parties split the difference.
- » If the difference is Y, the mediator does not disclose the numbers and negotiations continue.
- » If the difference is Z, the positions are not disclosed and the mediation ends.

Zone of agreement negotiation is where the mediator does not convey offers and counteroffers. The mediator holds alternative discussions seeking indications as to what each side would do working toward each side's reasonable offer and then zone of agreement. By maintaining positions in confidence, each side's position is maintained if no agreement is reached.

Multi-party assessments are used in multi-party cases. The parties work separately in confidence to draw a pie sliced by a percentage representing each party's view of liability. The mediator assembles the results, averages of the assessments and presents the sliced pie based on the collective average. Separate caucuses resume based on the collective thinking of the parties.

Principles or counsel only: Convening a session of principals may break the impasse where the principals have the capacity to talk to one another, particularly where there is a prospect of a continuing relationship. Alternatively, where the parties are unable to grasp the risks of litigation, the mediator may convene counsel to fashion a collaborative strategy appealing to the attorneys' role as counselors.

Mediator's proposal is often the final technique. With the parties' consent, the mediator makes a proposal; if both say "Yes," there is a settlement; if one party says "No," the negotiations end; and neither side knows if the proposal was acceptable to the other side. Where there is one "Yes" and one "No," some mediators will suggest to the affirmative side that negotiations continue.

There are two views on the formulation of the proposal. One, the proposal is based on a belief as to what each party would stretch to for resolution. The alternative is based on the mediator's evaluation of the merits. The mediator may provide an explanation, which has the benefit of articulating the issues entitled to persuasive weight.

Confidential advisory opinions: Where the parties' conflicting assessment is the primary obstacle and the risk of error significant, the parties may agree to an advisory opinion. This is akin to neutral evaluation; the difference being that it is within the framework of a confidential mediation. The mediator meets with the parties, gathers information, and prepares a tentative opinion; the parties are given the opportunity to challenge the tentative; and the mediator then issues a final advisory opinion, which is available to decision-makers who have not participated in the mediation. A further session is held to determine if either side has changed its position. If the case does not resolve, the opinion is not subject to disclosure.

The vast majority of cases resolve prior to trial. That is reason alone to seek to settle a case sooner rather than later and where the parties are unable to do so to seek the assistance of an experienced mediator. To achieve the best result requires preparation, critical analysis of the merits, a willingness to listen to the other side and in the final analysis the ability to appreciate what is obtainable as contrasted with what is desirable.

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