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# Overcoming Impasse at Mediation

by Benjamin E. Wick

*Reaching resolution at mediation generally involves overcoming an impasse between the parties. This article provides an overview of strategies to use at mediation to avoid impasse or to overcome it if it occurs.*

Impasse can arise at any mediation. It does not occur simply because the parties disagree on the value of a case. It could happen because, for example: mediation was scheduled before sufficient information was obtained; one of the parties was unprepared for mediation; the mediator's style hampers discussions; the parties have a different assessment of the case; or one of the clients is not truly ready to settle. Even if you have prepared in advance by evaluating your case, choosing the best mediator, preparing your client, and allotting appropriate time, your mediation can still be unsuccessful if you are unable to overcome an impasse. Understanding and applying the tools and strategies discussed in this article can go a long way toward resolving a case at mediation.

## Strategies for Avoiding Impasse at Mediation

➢ **Venting.** Let your client vent about the issues. It is important to remember that "[m]ost people attach emotions to conflict and need to reconcile themselves with letting go of those emotions before they can resolve the dispute."[1] Your client may create an impasse or be unable to overcome an impasse until he or she has the opportunity to vent about the situation and let go of his or her emotional attachment to the case. The way in which your client vents (for example, verbally or in writing, to the mediator or to the other party, directly or through you, in a joint session, or in caucus) is a judgment call based on your analysis of the situation and understanding of your client.

➢ **Communication.** Poor communication can be a cause of impasse. The parties at mediation have different goals, analyses, and understandings of the issues. As a result, one party may easily misunderstand the other. To avoid this problem, try restating to the mediator your understanding of the other side's position and settlement offers to confirm accuracy. If the parties have difficulty communicating, you can ask the mediator to forego any joint mediation sessions and instead conduct all communications separately in caucus.

➢ **Consider the terms of the agreement.** Before mediation, prepare a draft settlement agreement with your terms in an electronic format that can be edited.[2] Additionally, it is important to discuss any essential settlement terms as part of your negotiations. Often, specific provisions, such as confidentiality or noncompete clauses, can be just as valuable as the monetary terms in the agreement. Know the key terms and discuss them. Do not wait until the end of the mediation to raise a term that can cause impasse.

## Tools to Use if Impasse Occurs

➢ **Be creative.** Brainstorm openly without taking ownership of ideas in a way that allows participants to make creative suggestions without fear of negative repercussions.[3] Ideas can be based on prior settlements, terms to which the parties have already agreed, and from drawing on personal knowledge or experience in other areas. Use your mediator to assist in brainstorming.[4] The mediator has likely seen many solutions for resolving different types of claims. Draw from the different experiences and solutions to brainstorm ideas that work.

➢ **Think about solutions unconstrained.** Try to think of solutions completely unconstrained—meaning without considering financial, technological, temporal, or geographic limitations.[5] Then, explore how those solutions might be modified to the constraints in your case.[6] For example, when evaluating a reasonable accommodation request in the workplace, you can start by thinking of the best accommodations for the employee in the abstract. Once you have identified possible accommodations, try reevaluating the various options with consideration of the cost; the possibility of

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Alternative Dispute Resolution articles are sponsored by the CBA Alternative Dispute Resolution Section. They describe recent developments in the evolving field of ADR, with a particular focus on issues affecting Colorado attorneys and ADR providers.

implementing the accommodations based on technological, temporal, or geographic limitations; and the viability of the accommodations in the current position. Using this process, the parties often develop solutions not previously considered.

➢ **Consider contingent terms.** Contingent terms become effective at the occurrence of a specific event. Contingent terms can be used in many situations—for example, where an employee wants to continue employment through a certain date, but the employer does not want to pay any money until the employee resigns. In such a situation, the resignation of the employee would be the contingent term to trigger the payment.

➢ **Allow your mediator to present offers.** The mediator may be able to achieve a mutual resolution in caucus by presenting contingent offers: "'If I can get the other side to do X, will you do Y?' or 'If I can get the other side to pay Z, will you accept it in full settlement?'"[7] Another tool that can be used is the mediator's proposal. There, the mediator proposes a settlement based on his or her assessment of the case, and the parties respond confidentially to the mediator.[8] This is usually a last resort by the mediator, because the parties can lose confidence in the mediator if his or her settlement proposal is unsuccessful.[9]

➢ **Think about the other party's interests.** Each party at mediation has certain interests. By understanding the other party's underlying interests, settlement options can be considered on a continuum, instead of as a single-option solution.[10] Also:

> Settlements or mediated solutions do not have to be compromises or "split the difference" outcomes. By exploring different values and underlying interests, creative solutions and integrative outcomes may be possible.[11]

➢ **Explore nonmonetary options.** Money is often the issue that causes impasse. If you are at impasse, consider nonmonetary items that are of value to your client and the other party. Nonmonetary terms can be as valuable as money. Try brainstorming nonmonetary settlement options early in the mediation once you understand the goals of the other side. Next, assess the value of each of the options to each party. This assessment can be used to identify the value of a term for negotiations, as well as to determine when and how to leverage different terms. By using this method, you may choose to wait until discussions are at a standstill. Then, you can use the nonmonetary terms to leverage additional monetary compensation or to help your client understand the value of obtaining the nonmonetary item.

➢ **Reassess the value of your case.** By the time you are at mediation, you have already analyzed the value of your case. If you and the other side are far apart in your assessments of the monetary value of a case, do not be afraid to reevaluate. Listen to the assessments of the case by the opposing counsel, the mediator, and your colleagues. Try to reassess your case objectively by researching comparable cases, analyzing what a judge or jury is likely to do, and considering the litigation risks.

Jeffrey Senger has proposed using decision analysis, a mathematical assessment of the case, to determine the value of a case in settlement.[12] Assume you have a case where the defendant filed a motion to dismiss.[13] You believe the probability of surviving the

motion to dismiss is 75%; that you have a 75% chance of prevailing at trial; and that, if you prevail, your recovery would be $100,000.[14] To determine the settlement value, you take

> the probability of winning the motion [multiplied] by the probability of winning the trial, 0.75 x 0.75, which is 0.5625. This result is then multiplied by the payoff that results ($100,000), which yields an expected value of $ 56,250.[15]

If you assume that both sides would incur $10,000 in attorney fees:

> the expected income from the lawsuit would be only $46,250 for the plaintiff ($56,250 reduced by $10,000 in fees), and the expected cost of the lawsuit would be $66,250 for the defendant ($56,250 in addition to $10,000 in fees).[16]

As such, the settlement value of the case is between $46,250 and $66,250.[17]

Using decision analysis provides a methodology for estimating a baseline value of a case. However, it does not account for the inevitable unforeseen events in litigation. Furthermore, the two sides are likely to have a different assessment of the probability of winning, which would greatly skew the mathematical calculation.[18]

➢ **The bottom line offer.** At some point in mediation, one party will likely reach his or her bottom line. The bottom line may truly be the final offer, or it may be a negotiating tactic. Rather than trying to guess, use your mediator to find out if the other party really is at his or her breaking point and why.[19] Even if the other side is making a final offer, it may pertain to only one aspect of the settlement. If there is room to negotiate on other terms, there may still be a way to resolve the case, even if impasse has occurred.

## Conclusion

While working to settle a case at mediation, the parties should be prepared for impasse to occur. The suggestions in this article are by no means an exhaustive list of techniques to avoid or overcome impasse. However, they are methods that many practitioners have successfully used.

When determining which tools to use, do so with consideration of the temperaments of your client, opposing counsel, and the other party. Regardless of which methods you chose to implement, keep in mind that the goal at mediation is resolution. The ability to consider a variety of potential solutions, to be creative, and to continue discussions is key to overcoming impasse.

### Notes

1. Berman, "Impasse is a Fallacy: Only those who believe in it fall prey to its trap" 3, www.mediationtools.com/articles/ART_Impasse%20is%20a%20Fallacy.pdf.

2. Marcil and Thornton, "Avoiding Pitfalls: Common Reasons for Mediation Failure and Solutions for Success," 84 *North Dakota L.Rev.* 861, 874 (2008).

3. Brown, "Creativity and Problem-Solving," 87 *Marquette U. L.Rev.* 697, 698-99 (2004).

4. Also consider consulting with your coworkers, colleagues, or (where appropriate) other judges about potential solutions.

5. *See* Brown, *supra* note 3 at 706.

6. *Id.* Brown refers to first phase of this method, called "What Would Croeses Do," as a way of thinking of solutions as if anything is affordable and operational. In the second phase, the parties think of ways to modify the ideas into a workable solution.

7. Cooley, "Mediation, Improvisation, and All That Jazz," *J. of Dispute Resolution* 325, 348 (2007).

8. Melnick, "The Mediation Of Securities Class Action Suits: A Panel Discussion Hosted By The Benjamin N. Cardozo School Of Law," 9 *Cardozo J. of Conflict Resolution* 397, 404-05 (2008).

9. *Id.* at 405.

10. Menkel-Meadow, "Mothers and Fathers of Invention: The Intellectual Founders of ADR," 16 *Ohio State J. of Dispute Resolution* 1, 31 (2000) (discussing Vilfredo Pareto, who was responsible for "pareto-optimality," which is an outcome measurement that attempts to find the best outcome for both parties using an axis of preferences).

11. *Id.* at 36.

12. Senger, "Decision Analysis in Negotiation," 87 *Marquette U. L.Rev.* 723, 729 (2004).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 730. As Senger notes, "Technically, a dismissal based on the motion would probably require lower fees than a trial, altering these numbers slightly, but the general point remains valid."

17. *Id.*

18 Additionally, a complete case assessment using decision analysis can be fairly complex:

> In a hypothetical Title VII case, the plaintiff makes the following estimates: the chance of surviving the motion for summary judgment is 75%, the chance of establishing a prima facie case is 90%, and the chance of establishing that the defendant's explanation is pretextual is 67%. To analyze likely jury awards, the plaintiff estimates that there is a 10% chance that the jury will award $35,000, an 80% chance the jury will award $100,000, and a 10% chance that the jury will award $300,000. This type of calculation is difficult to do by hand and almost impossible to do accurately by means of a hunch.
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> This analysis shows that the expected value of the case at the beginning of litigation is $55,853. It also shows the value of the case as litigation proceeds. The second chance node (immediately after the summary judgment stage) has a value of $74,471, indicating that if the plaintiff wins the summary judgment motion, the case rises in worth by almost $ 20,000. At the final stage (when the jury is deliberating), the case is worth $123,500.

*Id.* at 731-33 (footnote and figure omitted).

19. *See* Berman, *supra* note 1 at 4 (noting that the bottom line may just mean that it is a party's final offer based on the current evaluation of the case under the present interpretation of the circumstances). ■