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How to Avoid and Break Mediation Impasse

By David W. Ichel
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The very reason for mediation is that the parties are in dispute, whether it a broken business contract, frustrated joint venture partners, a terminated executive, a securities class action, insurance counterparties or mass tort claims. My job as a mediator is to search for and bring the parties to a solution. Everything I do from day one is to learn from the parties what is most important for them and what may be possible areas for a solution.

Sophisticated players recognize that their chances of resolution are multiplied by being able to present their case to an experienced neutral who is totally devoted to helping settle their case by:

• giving unbiased feedback to counsel—and often more importantly—to their clients;

• challenging and probing behind the points each side is making;

• asking the difficult questions about the costs and burdens of litigation; and

• helping bridge the coverage issues between and among insurers and the defendants.

Reading, Listening and Developing Trust: Pre-Mediation Meetings

I am a huge believer in pre-mediation meetings to learn from counsel and their clients about how they see the dispute and how they think I can best help them get to a settlement. If there is time, I will first meet with counsel to find out from them their thoughts not just on the case and ideas for potential settlement, but also to get their input into how I can most effectively communicate with their clients and what they think their clients need. I then meet with counsel along with the client representative(s) as appropriate.

David W. Ichel

The Main Mediation Session

I have already built a relationship with each side by the time we get to our one or two-day main mediation session. We introduce everyone, and I give the parties a pep-talk on why I know that this mediation can be successful. I tell them that they have the full and complete power to resolve the case on their own terms, and that otherwise they will be outsourcing their outcome to a judge and jury over whom they have no control.

But the big question for the mediation is whether to start with each side giving opening statements about what they want the other side to know about their case. Many parties prefer to skip these presentations that they see as being a waste of time and potentially only antagonizing clients on the other side, but I have seen some of these have a real impact on the other side in terms of showing what the downside could look like. I do counsel the parties to avoid invectives and stick to the "facts" that they want to show the other side to make settlement compelling to them.

Most of the main mediation session consists of the separate caucus sessions in which I shuttle offers and messages between each side and help them focus on (1) their strengths and weaknesses, (2) challenges to their assumptions, (3) the costs

and burdens they are likely to face going forward, (4) an offer strategy and (5) an approach toward each successive offer that will help bring them closer to the other side.

Moving Far-Apart Parties Toward One Another: The Conditional Offer

More often than any mediator would like, the parties in a monetary dispute spend considerable time making small moves that leave them solar systems away from one another. One of the best ways to try to help the parties move closer together is the "conditional offer."

For example, if the plaintiffs have moved down to $300 million, and the defendants moved up to only $7.5 million, the conditional offer presents a good solution for either of the parties to incentivize the other to make a bigger move. The construct of the conditional offer is "if you move to $X, we will move to $Y." Putting it into our hypothetical, I might advise the defendants to make a conditional offer such as "we will move up to $20 million if plaintiffs move down to $100 million." The plaintiffs could either accept the offer, which creates a new bargaining range between $100 million and $20 million, or present plaintiffs' own conditional offer in response, such as "plaintiffs will move down to $150 million if defendants move up to $50 million."

Even if these conditional offers are not themselves accepted, they convey enormously helpful information and start moving the parties closer to one another. Moreover, while parties are never obligated to settle at the mid-point between their offers, each conditional offer range has a mid-point that can be examined and tested as a possible solution. With competing conditional offer ranges, one can calculate the mid-point between the two mid-points, and test how close that is to a neighborhood where a settlement might be achieved. The parties can continue to make a number of conditional offers until finally one party will say: "We are now going to make a solid number offer," and then there can be a further period of solid offer exchanges.

Non-Monetary Solutions

As a mediator, I am always looking for non-monetary "compensation" that can add figurative

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"currency." It might be a private or public apology, it might be a joint press release, a newly constructed business arrangement or the transfer of an IP license that could help settle the dispute. The list of possibilities is as long as the creativity of the parties and their counsel, and I am always trying to see if there are non-monetary aspects that can help make a settlement happen.

Tools for Breaking an "Impasse"

There are times when one or both parties will express frustration, with statements to me like: "well if that is where they are, we are at an impasse" or "That's it. We're done." My role as mediator is to calm the parties, and to persist to help get them to the "Promised Land:" a reasonable (even if not optimal) result that will be better than continuing the dispute through litigation or arbitration. Here are some tools to move past an impasse:

1. Display unrelenting optimism and good cheer, along with some chagrin or disappointment when conveying that more effort is needed from the parties.
2. Continually engage and brainstorm with each side and keep asking for ideas or "ammunition" to share with the other side.
3. Provide each side with a "Mediator's Cost and Risk Adjusted [Recovery] [Exposure] Analysis" that shows the probable damages recovery or exposure ranges—after litigation costs—at certain percentage ranges of probability of prevailing (e.g., at 30%, 40%, 50% and 60%).
4. Get each party's "Next to bottom-line number." Say something like: "It is 4:30 p.m. We need to

get real. Don't tell me your bottom line. Just tell me confidentially– what is your next to the last number?" That might give me something more with which to work.

5. Play some games with each side:

- Ask the people on each team to each write down what number each thinks it will take to settle the case on a fully confidential scrap of paper and then compare within the room the confidential variations. There could be new numbers!
- Ask each side to play the other side and make the next bid they would make if they were on the other side. It helps the parties see the other side's perspective.

6. The "Mediator's Proposal Protocol" is close to the final resort if the parties are still at an impasse.

If both parties agree, I will present a Mediator's proposed settlement number that I believe has the greatest chance to be accepted by everyone. This is not the number that I think is right as a moral matter, but one I believe the parties most likely will accept.

• I explain that it is a double-blind protocol where I will suggest the number in writing and each side can tell me *confidentially* in writing whether they accept or reject the proposal, yes or no.

• If both sides agree with my proposal, I simply tell everyone that the case is settled at the proposal number subject to documentation.

• If either side disagrees with my proposal, I tell the parties that my proposal was not accepted and that way a side that rejects the proposal never knows whether the other side had accepted or rejected the proposal.

• The amount of time I give to accept or reject the proposed number depends on what the parties want and what is needed at that time.

The Bottom Line

In the final analysis, I find that I can settle most cases when the parties come willing to roll up their sleeves, no matter how far apart they start.

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