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Address impasse as an opportunity to gain momentum

In mediation, we might rely on the reality check when negotiations have stalled. This is the time to change the focus from what ought to occur, to what is likely to occur

What do mediation and hockey have in common? Hockey involves a lot of back-and-forth action, posturing, frequent changing of lines, long periods of time without scoring, close calls, a few hard hits and foul plays and then suddenly the puck slides past the massive but nimble goalie landing solidly in the back of the net. Sound familiar? Parties score goals when they make progress toward settlement; impasse in mediation mirrors those long scoreless periods where every puck lands in the goalie's glove or bounces off his pads. Viewed with this perspective, impasse represents not the dreaded dead end, but a single and often inescapable component of a dynamic mediation process. Like those scoreless periods, impasse often needs to happen. Impasse if viewed simply as a delay in movement can create a new scoring opportunity.

Although plainly obvious, we do not always appreciate that most mediations are initiated by impasse. Either the parties have been unable to make progress and voluntarily agree to mediate or a court determines that the parties are beyond self-help and orders mediation. While inflexibility typically causes an impasse in mediation, tackling that inflexibility does not allow for a "one size fits all" approach. This article suggests a variety of tactics that can restart a stalled mediation and presumes that the mediator has established a certain level of trust and rapport with both sides before experiencing impasse. In order to identify the most effective approach in tackling impasse, a mediator needs to appreciate the various dynamics of the negotiations. Running through each approach seriatim without scrutinizing the big picture may be like trying to fit a round peg into a square hole.

Impasse often means the parties are not working in sync and it is time to reassess what part of the process needs tweaking. In preparing for mediation, the parties outlined their goals. Impasse warrants fresh deliberation over that mediation wish list. Most likely, during the course of the mediation process the parties have exchanged information that often serves to shed new light on their original objectives. For example, in a partnership breakup, one partner may have originally wanted exclusive rights to a client list.

During mediation, it becomes obvious that the client list provides limited value, while ownership of the domain names held by the partnership opens up new opportunities far more critical to the vitality and growth of the business. Conversely, one side may have originally wanted control of the business, only to decide that perhaps a buy out involves far fewer risks. Reevaluating goals allows the parties to refocus on what is important to them and to revalue the items on the table.

Using a timeout to relax and look ahead

When a party feels pressured or is simply emotionally spent from the stress of a long or taxing mediation process, they may dig in their heels simply as a defensive measure to halt a mental meltdown.

The mediator can alleviate this psychological overload by allowing the party to understand that settlement is not obligatory. The parties need to hear if they do not settle, they will certainly have a fair opportunity to try their case before 12 fellow citizens or an evenhanded and competent judge. Just as their attorney has been capably presenting the evidence and argument throughout the mediation, that attorney will similarly present the client's best case to the jury. Helping the parties understand that not every case can be settled may allow them to relax, to listen and to process better, and to trust their lawyer to help them through the mediation process. They will also know that the mediator is not "requiring" the parties to settle, but is simply providing them an opportunity to explore the possibility of settlement. While seemingly counter intuitive, the recognition that there are other alternatives to settlement often motivates the parties to continue exploring settlement options, less hampered by any sense of urgency to settle.

Often, the parties believe that in hiring a mediator, they have also acquired a fortuneteller. Impasse may be the perfect opportunity to have the parties pull out the crystal ball and address the future in concrete terms. The mediator should have the parties envision the future in the context of the litigation that looms before them. How important are the perceived goals of mediation relative to the opportunity costs of further litigation? Further discovery will entail potentially more time-consuming interrogatories, searches for documents, and depositions. The trial itself will consume more time and energy. During a break, the party's attorney might plot out the litigation plan for the upcoming months to give the client a clear picture of the torturous path ahead. If the parties and their employees were not attending depositions and collecting documents, how might that time and money be redirected on growing the business, or dare say, enjoying life's small pleasures? What opportunities will the parties sacrifice in investing their resources toward litigation and trial? Allowing the parties to

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review the multiple benefits inherent in settlement, including the certainty of outcome, avoidance of risk, curtailing further investment of time and money, and in some cases, moving beyond the emotional morass of the litigation, often results in a greater ability to accommodate more variance in the game plan. Without claiming credit for the original idea, I like to analogize settlement to arthroscopic surgery; it is still painful, but the pain is shorter lived and is far less debilitating, and recovery is far swifter.

Changing the focus can also lower the temperature in the room if emotions are hampering progress. If both counsel and the mediator have prepared for this session, they have a checklist of the deal points at play. Drop down the list a few lines and try one of the smaller bones of contention. What about that request for a neutral reference letter? Maybe the trees blocking the view need a rest, but what about those annoying wind chimes about which the neighbors are also feuding? If the discussion of construction vehicles traversing the easement is heating things up, perhaps shifting to limits on travel hours or number of trips may be more productive. Film credits may be too late to change, but what about the advertising? A commercial lease dispute might shift from CAM charges to signage or security. A shift can effectively shake loose stubborn resolve if the newest item on the table is of little value to one side, but particularly attractive to the side whose heels are buried in the pavement.

Settling scores

The mediator may also need to curtail the "blame game." A party may rightfully feel aggrieved and entitled to expect appropriate redress or, conversely, justified in maintaining blamelessness. But a party who maintains an exaggerated sense of entitlement or victimization, and is unduly hyper-focused on past wrongs and retribution, can cripple a settlement discussion. Allowing the party to shed the mentality of the oppressed and find a new self-perception shaped by their individual talents and abilities can often move the discussion forward. They will be better equipped to move beyond an unproductive fixation on past wrongs that cannot be undone if they can imagine a future determined by their own competence and autonomy.

Similarly, it may be beneficial to encourage acceptance of some degree of responsibility. With hindsight and reflection and a mediator's subtle (or not so subtle) suggestion, a party might recognize that their own poor judgment or bad business decision may have contributed to the current situation. If a party can acknowledge some fault, their intractability, cultivated by a disproportionate sense of entitlement or feeling of victimization, may dissolve sufficiently to spur movement. For example, in an employment case, where the defendant is outraged by perceived spurious claims, the defendant might need to acknowledge poor judgment in the initial hiring decision, inadequate supervision, or faulty damage-control practices. Perhaps the plaintiff is outraged over a co-worker's improper conduct, but needs to recognize that the conduct should have been reported sooner. In a partnership breakup, maybe all parties need to acknowledge the arrangement was a bad decision and this is their opportunity to mitigate damage. A suit involving an oral contract may require that the aggrieved party recognize that caution would have counseled a written agreement. Sometimes the parties have arrived at litigation by simple bad luck, bad judgment or plain stupidity. A mediator may need to emphasize that settlement offers the opportunity to minimize the harm, not necessarily undo it.

A more difficult task, – but one that may restart the process – is that of asking the parties to empathize with the other side or stand in their shoes. Where the opposing side has been injured, focus on the impact of that injury rather than fault. Recognizing that the plaintiff has suffered a traumatic injury may allow defendants to get beyond their own sense of victimization, or at least engender a better understanding of the genesis for a seemingly excessive demand/or irrational intransience. Where the parties are business competitors, ask them to consider what might be inexpensive to offer, but valuable to the other side. Conversely, have the parties identify what is valuable to them but perhaps not costly to the other side.

Walking in the other side's shoes often allows for creative solutions as simple as an apology, recognition, a letter of reference, indemnification, an easement or access, or simply a charitable donation. Are the parties in a position to provide something of value that is mutually beneficial? Plaintiff business may agree to offer its customers gift certificates for the defendant's services. Plaintiff gives its customers added value while defendant will obtain advertising and added traffic from having the plaintiff hand out its gift certificates. A client owes a plaintiff Web designer fees, but that plaintiff might benefit from the client advertising plaintiff's business on its Web site. Is there a tax benefit to allowing a payment schedule? An adjustment in price or terms of future purchases might accommodate both the immediate problem and the long-term relationship worth preserving. With a nod to that bird in hand as opposed to those two in the bush, obtaining the security of a non-dischargeable but smaller stipulated judgment along with a payment plan may be more cost effective than pursuing a larger default judgment in a bankruptcy proceeding. Engaging in this comparative worth analysis may not always produce a creative solution, but the process often allows the parties to gain an overall better perspective as to the relative needs of all sides.

Identifying the captain and the cause

Not infrequently multiple players on the same side are not in sync, or are conversely, afraid to veer from lock step. If one player's conduct is hindering the process, the conduct needs to be addressed. Is one individual blocking any discussion that jeopardizes the "party line" requiring determined and

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stern resolve? The mediator may want to talk to the individuals within a side separately to determine if the rigid stance is truly a reflection of a consensus view, or if there is simply a reluctance to be the first to allow a conciliatory response suggesting "weakness." Individual discussions can identify whether there is flexibility within the side and may also identify the true decision maker. It might even be helpful to ask the most rigid member of the group to play devil's advocate within the group, asking him or her to debate the strengths of the opposing side with a colleague.

Mediation can also lose traction if a party's attorney is championing the client's position with undue intensity. The mediator can recognize the value of aggressive pit-bull lawyering at trial, but suggest a little more lipstick in mediation negotiations. Where the goal is to encourage concessions from the opposing side, the carrot, albeit a vegetable, might be more fruitful than the stick.

Impasse and matters of "principle" often go hand in hand. Whether it is the plaintiff or the defendant who raises the matter of principle, they crave cosmic justice. Unable to attain such justice, a plaintiff will demand more from the other side, and the defendant will refuse to do more. While standing on principle may be a metaphor for inexplicable obstinacy, an earnest desire to make things morally right cannot be dismissed. In certain instances, it may be necessary to empathetically acknowledge the value of the professed principle along with a frank discussion of the limitations of mediation and litigation.

No need to mince words; our judicial system has limited ability to administer perfect justice. Sometimes creative solutions will satisfy the matter of principle. A defendant might be willing to donate additional money to a charity rather than pay the plaintiff, and the plaintiff may be willing to direct a portion of the settlement toward a charity. Venting can be cathartic and not costly to the other side. Wronged employees may be willing to reconsider a line in the sand if allowed to meet with the other side and speak their peace.

An acknowledgement of a wrong or an apology can also accomplish the matter of principle. In contrast, a defendant may be willing to meet a monetary demand only if it is made clear that the payment is without any admission of fault. Standing on principle sometimes persists only as long as emotions run high. Change the subject, move the conversation in a less emotional direction. Table the matter of principle long enough and it is forgotten.

Reality check

Returning to the original hockey analogy, everyone knows that "checking" is an integral part of hockey. In mediation, we might rely on the reality check when negotiations have stalled. This is the time to change the focus from what ought to occur, to what is likely to occur. Review the evidentiary problems, spotlighting the most damaging and problematic. Where credibility is key, inform the party that you want them to experience a bit of cross-examination. Then proceed to question the party in detail, pointing out any holes and inconsistencies. Can they explain why certain documents are inconsistent with their version of events?

Does their version just strain common sense? Where warranted, explain in no uncertain terms why their story strains credulity or fails to account for undeniable documentary evidence to the contrary.

Not uncommonly, counsel has not aggressively cross-examined the client and is surprised by what is revealed. If the party's version of events will not court champions in the jury, the party should understand this reality. If one side claims to have a powerful document and they are willing to disclose it, ask for a copy to share with the other side. A party who has brought their laptop containing deposition transcripts, e-mail discovery and other documentary evidence is at an advantage to quickly produce an item of evidence that might change the tenor of the discussion.

Talk is cheap, but when a party can produce a hard copy of their smoking gun, the mediator has a more valuable talking point. On the other hand, if the gun is shooting blanks, the marksman needs to realize that they won't be able to shoot themselves out of a paper bag with this evidence, let alone sway a jury. Often, painfully aware of these flaws, counsel has been either unable to forcefully articulate them to the client, or has done so to a client with selective hearing loss. The client may need to hear it from the mediator before the unpleasant truth sinks in.

The role of the cheerleader

Pollyanna is also underestimated. When everyone is ready to throw in the towel, the mediator's optimism can go a long way in breathing hope into the mediation. Particularly where the clients are not experienced negotiators, they need to be assured by the mediator that impasse is often part of the process and not insurmountable. This message can be conveyed in various ways. Well-directed humor can put everyone at ease, counter fractious sentiment, and set everyone on a slightly different tack. No doubt the lawyers and mediator have plenty of "truth is stranger than fiction" courtroom moments to impart. Sharing funny, or not so funny, anecdotes of other mediations (with the details sufficiently disguised so as not to violate mediation confidentiality) can both lighten the mood and subtly remind the clients that the lawyers and the mediator have plenty of mediation experience and have successfully navigated similar terrain. Confidence can be contagious. A mediator who can convey that impasse is "nothing out of the ordinary," and is frequently overcome, can instill the parties with like confidence and a greater trust in the mediator's skills.

Everyone likes to feel successful. When mediation progress slows, pat yourselves on the back a little. Review where you started and examine how far you have come. Sometimes progress can be measured in digits; the parties started

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out ten million dollars apart, and they have now come within a million dollars. One digit nicely eliminated. If impasse has resulted in little appreciable dollar movement, you may have to look deeper to identify progress or success. Sometimes information gained is as good as a digit lost. What have the parties learned about their own case? Did they obtain some "free" discovery? Did they realize that if the case does not settle, they have some serious holes to fill in their case? Did they learn that the opposing side is close to filing bankruptcy or is about to close on a lucrative contract? Negotiated deal points without dollar signs are also valuable. Highlight how many of these items have been resolved. Recognizing how far the sides have come can diffuse any feeling of futility and inspire further effort. Once the parties see that they have made a huge investment and have made major strides in closing the gap, abandoning the mediation is an unpalatable option.

Tiebreakers

When the gap is relatively small, the mediator may want to try a page from Solomon's playbook. Suggest that they split the baby and appeal to both side's sense of fairness. If the suggestion comes from the mediator, neither side will be able to feel aggrieved by the other getting in the last word. When the difference halved is relatively small in comparison to both the costs of trial and the overall settlement amount, walking away is difficult. Alternatively, the mediator may have a sense that one side will not agree to split the difference, but the other side will be unable to resist a smaller jump. Perhaps one side simply needs to have the last word, even if small. Poke around. Test the waters. Where it is apparent that both sides need the last word, it may be appropriate for a mediator's proposal.

Ideally, the mediator proposes terms that are designed to settle the case, as opposed to terms that are objectively fair. The proposal needs to be sufficiently tempting to make the declination alternative illogical and ill advised. A party may often hesitate to make further concessions unless they believe that the concession will lead to a settlement. With a mediator's proposal, a party might be more motivated to make that last concession if they are confident that the mediator can identify the terms that will be mutually agreeable. Given that an acceptance is never conveyed unless it is mutual, the unilaterally accepting party loses no ground in the settlement negotiations. And in the event of a mutual acceptance, no one has to bow to the last word of the opposing side. It belongs to the mediator who has no stake in the action.

Almost none of the above ideas can I claim as original. I have collected them and adapted them over many years of settling cases. While the success of these suggestions will depend upon many variables, one admonition is universal: never give up.

"Many of life's failures are people who did not realize how close they were to success when they gave up." — Thomas Edison

Retired from Los Angeles Superior Court in 2008, Judge Patricia Collins, practices in Southern California as a mediator, arbitrator and referee with ADR Services, Inc. *Her 20-year judicial career included assignments in Law and Motion, General Civil Trials, and Long Cause Civil. Prior to taking the bench, Judge Collins was an Assistant United States' Attorney, primarily prosecuting financial fraud crimes. She also practiced with the firm of* Adams Duque & Hazeltine, *litigating business and insurance matters. A graduate of Georgetown University Law Center, her areas of expertise include business, real estate, finance, insurance, personal injury, entertainment, professional malpractice and employment.*