Avoiding Impasse and Reaching Agreements in Mediations

By Bobby M. Harges

Mediators are hired to help parties settle cases. When cases are in litigation, most lawyers who attend a mediation go there expecting the litigation to end and to move on to the next case. Although there are different approaches to mediation — such as transformative mediation1 where the goals of empowerment, recognition and the desire to change how people interact with each other during conflict are of utmost importance, and facilitative mediation2 where the mediator does not offer an opinion on the strengths and weaknesses of the parties' cases — in mediations where lawyers are involved, lawyers expect the process to end with a binding and enforceable settlement agreement.3

Two of the key ingredients to obtaining a settlement at a mediation are lawyers who are prepared for the mediation and an effective mediator. An additional ingredient for a successful mediation is for the parties to know how a good mediator works with the parties to avoid an impasse and to reach an agreement. This article addresses a myriad of things that lawyers can expect at a mediation and how lawyers can work with the mediator to avoid an impasse.

Knowing When an Impasse Occurs

A good mediator will not stop mediating until the agreement is signed. During the mediation, it is important to know what an impasse is and who is saying that the parties are at an impasse. An impasse in a mediation occurs when all parties *and* the mediator believe that they cannot reach an agreement. An impasse does not occur when only one party thinks that an agreement is not possible.

How Do the Parties Know When to End the Mediation?

Many mediators are paid by the hour. At some point, it may become obvious to the mediator that the case will not settle that day. How will the parties know when it is over? The parties must trust the mediator. A good mediator will not unnecessarily prolong the mediation and will let the parties know when progress is no longer possible. Many cases settle during a mediation long after the parties believe that they were "wasting their time" or "spinning their wheels." An effective mediator will consider whether further movement is possible at the mediation or whether a short break is necessary to recess until further discovery is conducted or whether follow-up is needed in a day, a week or a month. In most cases, the mediator will determine what to do when parties are approaching an impasse, depending on what caused the impasse.

Lack of Settlement Authority as a Cause of an Impasse

Sometimes the lack of settlement authority at the mediation often leads to an impasse. The mediator can prevent an impasse in this situation when he works with the parties before the actual mediation commences to ensure that the appropriate parties will attend the mediation. It should be abundantly clear to the parties that the mediator expects the parties to have the representatives with settlement authority present at the mediation, either physically or virtually. With the various types of technology available today, an excuse that the decision-maker could not attend the mediation should not be accepted. If, even after the diligent efforts of the mediator to obtain the presence of the necessary parties at the mediation, the representatives are still not available, attorneys can look forward to the mediator probing those present at the mediation intently with questions about what can be done at the mediation to ensure that a settlement occurs either that day or a later time, such as contacting the party with settlement authority by phone, fax, email, text or other similar method. If the authority figure is not able to be contacted at all during the mediation, one would anticipate that the mediator would get a commitment from the representatives at the mediation to make a recommendation in accord with the tentative agreements made during the mediation. Another possibility is for the mediator to discuss exactly what will happen when the authority figure is contacted. In other words, anticipate that the mediator will not stop the mediation simply because one party communicates that the authority figure is not available for the mediation.

Parties Simply Going Through the Motions

If the mediation is headed towards an impasse because one of the parties does not want to settle at the mediation, the mediator must work with that party to show him the benefits of settlement. The benefit might be a quicker resolution of the case, the saving of money, or less stress on the parties resulting from a final settlement. In mediations with lawyers, one can expect these matters to be discussed during the caucuses instead of in the joint session. During the caucus, expect the mediator to also conduct a risk-benefit analysis that will give the parties a better understanding of the benefits of settlement and how significant risk is involved when a case is tried by a judge, jury or arbitrator.

If the impasse occurred simply because the parties attended the mediation merely because the judge suggested or ordered the mediation, this is another opportunity for the mediator to show the parties the path to settlement. Just as a salesperson has an opportunity to sell a piece of furniture to a couple who are just browsing while visiting the showroom on a Saturday evening, the mediator has the opportunity to demonstrate to the parties that settlement is the right choice to make. An experienced mediator simply will not allow this opportunity to pass. The mediator will realize that, even if parties with settlement authority are present at the mediation simply because they were ordered to be there, seizing the moment and focusing the parties on the benefits of settlement will often lead the parties to a settlement. Typically, most people who attend

a mediation want to settle the case. The mediator must be the catalyst who aids the parties in understanding their needs, interests and concerns. This process will often lead to the parties realizing that settlement is a better option than a trial.

Different Perceptions of the Case

When different perceptions of the case, the law and/or the facts lead to an impasse, one can anticipate that the mediator will have a candid discussion with the parties in the caucuses in order to assist the parties in evaluating the risks, costs and benefits if the dispute is not resolved at the mediation. This discussion with the parties will give the parties a different perspective about their cases. This is particularly true when parties become too attached to their case, having lived with the case for weeks, months or years, only to focus on the facts and laws that benefit their case. The mediation process works better when the parties are open to this type of discussion with the mediator as such will benefit both the lawyers and clients because both will become more knowledgeable about their cases, thus resulting in a change in perspectives of the case, the law and/or the facts. When parties are too emotionally attached to their case, the mediator might focus on facts or circumstances that one of the parties might have overlooked or thought to be unimportant. A different perspective on a case promotes understanding and a better knowledge of how a case might look to an "outsider" such as judge, jury or arbitrator. During litigation, lawyers will generally consider all the possibilities that could occur at a later adjudication. However, lawyers are often singly focused on the facts that best support their position and they suppress or toss aside facts that appear to support the other side.

During these candid discussions, rather than with the parties, the mediator simply engages the parties in an analysis of the strengths and weaknesses of their respective positions, interests, the law and the facts. This discussion and re-analysis of the critical issues in the case will empower the parties with more

information and will help to promote settlement. Lawyers and litigants might view these "crucial conversations" with the mediator as adversarial. However, the mediator is simply examining the interests and needs of the parties to ascertain what is really important to the parties and to ensure that the views held by the parties are in accord with reality. This task performed by the mediator allows him to become an agent of reality, a person who effectively deflates extreme positions and unreasonable demands, while remaining neutral, objective and balanced with the realization that all disputes will someday end and that the dispute in issue should very well end that day. All of this will result in settlement, after the parties have looked beneath their positions, explained their thinking, and considered the views and interests of the other side.

A Case Being Mediated Too Early

If the fact that the case may have been mediated too early is the cause of the impasse, the mediator might suggest a recess of a few weeks or a few months until more information is gathered through the discovery process. Perhaps a deposition of a critical fact witness will provide the missing information, or the opinion of an expert witness is necessary to offer a perspective on the case that was lacking at the mediation. Alternatively, if critical facts are not known that will allow the parties to properly evaluate the case, the mediator might get the parties to consider the possibilities if certain facts turn out to be one way or the other. For example, a serious disagreement between lawyers might exist on the value of a personal injury case based on the difference of opinion of whether the plaintiff, who was injured in a motor vehicle accident, needs surgery. One option at the mediation would be to recess the mediation until the deposition of the treating physician is taken. Another option is for the mediator to discuss with the parties the value of the case if surgery is needed as compared to the value of the case if surgery is unnecessary. A discussion of these values will educate the lawyers of the possible outcomes at trial which could give them the necessary information to properly evaluate the case for settlement.

The Pendency of a Dispositive Motion

If the pendency of a dispositive motion is causing or leading to an impasse, the mediator again has an opportunity to discuss with the parties the various possibilities that might result after the judge rules on the motion. The possibilities include a partial or complete victory for the plaintiff or a similar ruling for the defendant. The mediator has an opportunity to have the parties consider all the various possibilities. These discussions will enlighten the parties, giving them information or insights that they may not have considered before the mediation.

The willingness of the parties to be open-minded and to work with the mediator can open new avenues and allow the parties to investigate new possibilities for settlement.

Running Out of Time

Occasionally, the parties will reach an impasse because someone has an afternoon or evening commitment such as an airplane to catch, a child to pick up, or an afternoon meeting. If this information is learned shortly before the time of departure for the commitment, the parties and the mediator can be caught off guard and surprised, thereby interrupting the progress of the mediation. In this instance, an impasse can be avoided if the mediator learns early on, at the beginning of the day, of the commitments that might interfere with the mediation. The knowledge of these obligations will allow the mediator and the parties to plan around these obstacles, thus preventing them from becoming stumbling blocks to an agreement. For example, if everyone present at the mediation knew that a decision-maker had to leave the mediation at 3 p.m. to catch an airplane, knowledge of that fact will allow the participants to take this fact into account during the day instead of being surprised by the departure of the principal at the last hour. Similarly, if a party must leave the mediation early because of a commitment with a child, perhaps a recess for a few hours could allow the parties to continue with the mediation later that evening.

"If you were me, what would you do?"

Occasionally, despite all of the diligent efforts of the mediator before and during the mediation, the mediator might believe that the mediation is at an impasse. Before announcing to the parties that the mediation is over, the mediator might ask the parties for their thoughts on how to keep the prospects of settlement alive. Questions like "what do you think?," "what would you do if you were me?" or "do you have any ideas?" might be just what the parties need to inject new ideas into the mediation. In a recent case, after seven hours of mediating a commercial matter, an impasse was on the horizon after the parties had made significant progress throughout the day. It was late in the evening because the mediation did not begin until noon. Before announcing to the parties that there was an impasse, one lawyer informed one of the lawyers in a caucus that he did not believe that the case would settle that day and asked him if he had any ideas. What resulted was a solution that previously had not been considered. When it was presented to the other side, the case settled after another two hours of mediation.

Use of Conditional Offers — Brackets

In many mediations such as in personal injury cases, the key question is how much money one party will pay to the other. When the parties appear to be progressing too slowly after a significant number of offers, and if the parties are still far apart, the mediator might get the parties to consider making conditional offers or using bracketed offers (also referred to as brackets). A bracketed offer is a way to break an impasse or to expedite settlement negotiations that are proceeding slowly. A bracketed offer is a conditional offer made by one party who offers to make a greater concession than previously made in exchange for a greater concession by the receiving party. For example, if the last offers of the defendant and plaintiff in a personal injury case are $50,000 and $450,000, respectively, the defendant, who has increased his previous offers by $2,500, $5,000 and $15,000, may propose to increase his offer from $50,000 to $100,000 if the plaintiff decreases his demand from $450,000 to $250,000. In the example, the plaintiff had made previous concessions of $5,000, $10,000 and $15,000. Here, the defendant's proposal to increase his offer by $50,000 is contingent on the plaintiff reducing his offer by $200,000. In response to the defendant's bracketed offer, the plaintiff can accept the bracketed offer and the mediation will continue within the range of the bracketed offer. Alternatively, the plaintiff can make a counter-bracketed offer which the defendant can accept or reject. The introduction of brackets into a case can jumpstart an otherwise slow-paced mediation and increase the chances of settlement.

Conclusion

Mediation is a process. It has a beginning, a middle and an end. It takes time for parties to consider and to reconsider their previous positions and the offers and counters of the other side. Thus, it is incumbent on the parties and the mediator to be patient in order to give the mediation process a chance to succeed. Trusting and working with the mediator and allowing him to guide the parties towards settlement will go a long way in avoiding impasse and reaching agreement.

FOOTNOTES

1. See *www.transformative-mediation.com/*.

2. See *https://www.peoples-law.org/mediation-approaches*.

3. In Louisiana, a Memorandum of Settlement Agreement that is executed by the parties during a mediation is binding even if the terms of the agreement indicate a subsequent more detailed settlement will be completed later. See, Bobby Marzine Harges, *The Handbook on Louisiana Alternative Dispute Resolution Law*, 38 (Esquire Books 2011) (citing Walk Haydel & Associates, Inc. v. Coastal Power Prod. Co., 720 So.2d 372; and LeBlanc v. State Farm. Ins. Co., 878 So.2d 715 (La. App. 3 Cir. 2004)).

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