

# BREAKING THE IMPASSE

*“The Unique Mediation Opportunity”*

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**M**ediation provides a unique opportunity for the parties as it relates to the opportunity of a negotiated resolution of their case. Typically, in a negotiation, one party gets to his/her/its goal, the other party gets to his/her/its goal, and rarely are those goals the same. If impasse occurs, litigation will commence, continue, or be completed. Absent facilitation, no one is encouraging getting back to re-evaluation or re-negotiation. Certainly someone can suggest continuing negotiation, but typically neither side wants to show the other such interest (it being perceived as a weakness in the negotiation process).

Mediation, on the other hand, brings to the table that facilitation that is otherwise missing in a pure negotiation context. The neutral, while there to facilitate the negotiations, is also there as an advocate for the process. The mediator represents resolution similar to the responsibility of an attorney to represent his/her client. The mediator is going to work as hard for the process as the attorneys are going to work for their respective parties.

In this regard, the mediator serves as both the vehicle and the opportunity for breaking impasse. The sooner the mediator is brought into the process, the better and more able the mediator is to assist the parties in getting to “yes”. The mediator can assist with the exchange of information, as well as, the exchange of communications, as well as, the exchange of offers. The mediator can expedite information gathered, as well as, filter communications. Therefore, “breaking impasse” becomes the mediator’s responsibility from beginning to end.

In the beginning, the mediator can assist parties in getting to the table through designing of the mediation process. This can include not only exchanges of information, but also the establishment of pre-mediation caucuses with one or more parties. Especially in multi-party, mass tort, and class action cases, design of the mediation is vital to the ultimate resolution. It also stabilizes the relationship of the parties in getting to the table.

In a previous article entitled “Designing The Mediation” (see attached), I elaborated on the various design techniques that facilitate the parties in getting to the table. In this article, I am going to focus on “breaking impasse” as it relates to closing the deal. In complex cases (including mass torts and class actions), there are four aspects to the opportunity of breaking impasse in closing the deal.

## 1. **CALLING ON THE LEADERSHIP**

It is not unusual in complex cases for each room to have a number of participants—both lawyers and non-lawyers. Among the lawyers there may be in-house counsel, as well as, outside

counsel; there may be referral attorneys, as well as, litigating attorneys. As for the parties there may be the Plaintiff, as well as, Plaintiff's family (sometimes to include extended family). On the Defendant's side there may be corporate representatives, as well as, insurance coverage representatives. Among insurance representatives there may be primary carriers, as well as, excess carriers. Speaking to a particular side involves a multitude of personalities, interests, and perhaps negotiating strategies.

The ability to call on the leadership of each room is a matter of timing, as well as, identification. Who is the right person to call on at that right time to meet with the right representative from the other side? Sometimes this requires more than one person from each side.

In a case where two companies were suing one another (one on a promissory note and the other on fraud) each room had a combination of corporate representatives, in-house counsel and outside counsel. It was clear that the formal position of the parties would not and could not achieve resolution. (Each side was insisting on the flow of money going to them not from them). The ability to break impasse was the ability to bring the corporate representatives together to make a business decision as opposed to a litigating decision. This could not occur the first thing in the morning nor after opening session. In fact, it could not occur until both sides had frustrated their formal negotiating positions and reached a point where their negotiating strategy had, in essence, failed with neither party willing to cross the demarcation line of zero. The opportunity of bringing the corporate representatives into a room (with the agreement of their counsel—both in-house and outside) was the key to the ultimate resolution. In a private session, the parties agreed to enter into a buy-sell arrangement of the outstanding minority shares which one party had of the other parties' company. The note was forgiven and the claim for fraud was dismissed. The case was resolved.

In a case where sixty-three property owners were being sued for wrongful death and personal injury of several workers, each room had a multitude of parties, party representatives, and/or attorneys. Prior to the mediation leaders from both rooms emerged among counsel so as to be able to look for direction from that counsel during various stages of the negotiation. By establishing this leadership prior to the mediation, the parties knew who the leadership was and the mediator knew who the "go to" persons were so that after a multiple day mediation, all claims of all parties were resolved against all Defendants.

There are circumstances where insurance representatives may have conflicting interests with corporate representatives, or where insurance representatives have conflicting interests among themselves (especially where primary and excess carriers have different interests to protect). So too in a Plaintiff's room, there may be differing interests between the Plaintiff's referral attorney, the litigating attorney, and a guardian ad litem. In each case, calling on leadership at the right time avoids divisiveness and gets direction where impasse may otherwise occur.

Once that leadership is identified and can be brought together from the respective sides, separate or joint dialogue can occur to (1) rebuild trust, (2) define goals, and (3) find a new direction to the negotiation that is mutually acceptable.

## 2. COURT DIRECTION

Court direction can be a vital tool whether suggested or actually implemented. Where parties have varying views as to what a judge, jury, or appellate court will do, the opportunity of “testing it” can be a means of breaking impasse. Such court opportunities exist with pre-trial conferences, summary judgments, and settlement conferences. They also exist in mock juries, focus groups or settlement juries.

Where a court can give some direction without the parties disclosing the status of their actual negotiations, such direction can be very helpful. A summary judgment motion as it may relate to one or more issues may, likewise, be of great help. It is usually best to keep the judge away from the actual settlement between the parties; however, there may be times that the judge can assist in requiring all parties or persons with full settlement authority to be present—whether in subsequent settlement conference or in a court ordered re-mediation.

While pre-trial conferences, summary judgments, and settlement conferences are well-known, mock juries or focus groups and settlement juries may not. Mock juries and focus groups give the parties an opportunity to test the receptiveness of their position before assimilated jurors of similar backgrounds to that of the venue at issue. When such mock juries or focus groups produce conflicting results (Plaintiffs’ focus group shows results contrary to what the Defendants’ focus group may show—resulting in impasse), a mediation focus group may be in order. Such a mediation focus group allows the mediator to facilitate assimilating a group of jurors and allows each party to make their own private presentation to said jury. Thereafter, the jury can render a decision and confidentially answer confidential questions posed by each side. Neither side will know the other’s questions or the jury’s answer to those questions. To the extent that a verdict is requested, it will be forthcoming and made known as agreed upon by the parties. Obviously, any such result is non-binding and remains confidential as to the participants.

The implementation of a court order or focus group may not be necessary. Merely the suggestion of the utilization of such direction may allow the parties to re-think their positions and provoke further dialogue and re-evaluation.

## 3. CONDITIONAL OFFERS

Where negotiations are stalled either because the Plaintiffs are too high or the Defendants are too low, conditional offers can be a means of breaking impasse. Where Plaintiffs will not move below ten million dollars and the Defendants suggest the opportunity of negotiating is in six digits, conditional offers can free the parties from the “cancer” of relationship bargaining. Many times higher offers from Plaintiffs and lower counter-offers from Defendants are provoked because each side is looking at the relationship of their offer to that of the other side. Such relationship bargaining is not helpful to the mediation process.

While the mediator will typically urge the parties to make negotiating moves, not in relationship to the other sides’ numbers, but in relationship to their own goals, often times the parties do not abide by such worthy suggestion, or can not do so. It is in this circumstance that conditional offers play a role. Many times such conditional offers must await several rounds of

negotiation. However, when the parties remain very far apart after two or three moves, sometimes conditional offers are called or at an earlier stage.

Conditional offers are also known as bracketing or framing of the negotiation. The beauty of the conditional offer is that where a Plaintiff will not go below ten million dollars because a Defendant has not gotten to a million dollars (or vice versa), a conditional offer can suggest that the Plaintiff will come below ten million dollars, if the Defendant will come to a certain level. Alternatively, a Defendant can indicate that it is willing to go to a certain level if, and only if, the Plaintiff comes below a certain level.

While it is each sides' intention to get the other side to accept the conditional offer or bracketing, the failure of such acceptance is not fatal. In fact, it can assist in "jump starting" the negotiations. That is to say that where the parties have been above ten million dollars and below one million dollars, a conditional offer from the Plaintiff can suggest some seven digit area that the Defendant may be able to accept or be willing to negotiate at a different or competing bracket. Once the brackets are identified, there is a means of negotiating between the brackets, typically called "negotiating" or "narrowing" the brackets. A number of offers or counter-offers involving bracketing can get the parties to "yes" in an expedited fashion. Bracketing opportunities can reinvigorate the process.

#### 4. **MEDIATOR'S PROPOSAL**

Where the parties have gotten to the point that neither side will make any further movement, impasse occurs. In a negotiation, "it's over". In a mediation, "it's just begun".

The mediator and the parties need to realize that the Mediator's Proposal may be the mediator's one "silver bullet" to assist the parties in resolving their case. Therefore, it must generally be used with a high level of discretion and at the end of the negotiating process in order to break the impasse.

This proposal can not be a proposal of any one party. Rather, it must be that of the mediator. The Mediator's Proposal is not a suggestion of what the judge, arbitrator or jury will do; rather it must be understood to be in the context of the mediation. That is to say, that the Mediator's Proposal is an effort to "stretch" both parties beyond that which they would otherwise move in a negotiated fashion, but not so far as to lose the opportunity of obtaining a resolution. In essence, it is a "Mediator's Proposal" and not a proposal of a judge, jury, or appellate court.

The mediator must first determine that the parties are willing to accept the concept of a Mediator's Proposal. That concept works as follows: If the concept is accepted, the mediator will determine that number above and below which he/she thinks the parties will be willing to go. The number is published to both sides either separately or jointly (typically, it is done separately). The mediator then solicits two yeses or otherwise publishes two no's. The responses will be and will remain strictly confidential.

The mediator will never disclose what a party individually says. The mediator will simply disclose two yeses or two no's. If the mediator confidentially hears a yes and a no, he/she will only publish 2 no's. The mediator will never disclose if any one party said yes. Sometimes the parties can

make their response at the mediation itself. Sometimes the mediation must adjourn to give the parties an opportunity to re-evaluate their position in light of the proposal made.

While sometimes the only issue is “the number”, there are occasions—especially in complex cases—where other terms and conditions must be a part of this proposal. Accordingly, the mediator should include all material terms as a part of the Mediator’s Proposal. Such terms include non-monetary remedies, as well as, monetary remedies. They include payment terms, releases, and dismissals. Some proposals can be quite brief; others may be quite elaborate. Some proposals may need to take stages, i.e. preliminary framework approval and thereafter, more specific details, terms and conditions. Once the Mediator’s Proposal is established and communicated, the parties should be given a reasonable period of time for determining its acceptability and delivering their confidential response to the mediator. Considerations in this regard are as follows: (1) Should you allow the parties to leave the mediation session and have the opportunity to consult with other people? (Sometimes this can be very helpful; sometimes it can be very harmful.) (2) Do the parties need to seek advise of persons of higher authority whether individually, committees or boards? (3) Is it helpful to “get away” from the table, take a “breather”, and “sleep on it”. (Again, this can be both helpful and harmful depending on the circumstances and the people involved). Such reasonable time period, therefore, must be determined under the particular circumstances of the mediation.

The Mediator’s Proposal is the most unique aspect of a mediation that clearly separates the value of the mediation process from that of the negotiation process. The successfully executed Mediator’s Proposal makes the difference in breaking impasse.

## **CONCLUSION**

Parties call on the mediation process anticipating that a third person is necessary to help the parties do what they can not otherwise do. Mediation concepts such as convening or designing the mediation, conducting opening sessions, and facilitating negotiations all have their own unique values. Breaking impasse is the most vital role a mediator can be called on to achieve. The parties must be patient with both the mediator and the process so as to be able to look for such opportunities at the right time in the right way. Premature efforts to break impasse will result in failure. Allowing the parties to define their own impasse and then be prepared to do something about it is vital. Remember to establish the distinction between breaking impasse of the process and breaking impasse of the negotiations. The former should be considered at an earlier stage, the latter should be considered at a later stage. Each case has its own timeline; and other than a general statement, no one rule can apply to all mediation circumstances. The mediator’s ability to break impasse of process or negotiations at the right time in the right way is the key to a successful mediation.

Respectfully submitted,

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