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Lee Jay Berman

Mediation impasse: Reality or fallacy?

Mediators are hired to settle cases, so impasse is a bad word if not an outright fallacy

It happened again. You drove with your client to the mediator's offices, you spent 10 hours in a mediation session—often waiting for long stretches for the mediator to return from the other room, your client went through the entire range of emotions during the day, and gave and gave until they had reached beyond any "bottom line" the two of you had established, and still the case didn't settle. Now you have that long, tedious drive back to the office with a client who is frustrated, disappointed, wrung out, maybe even angry. During the silence you know that somehow your client is blaming you. You selected the mediator, who was disappointing at best. You had the client's hopes up that today would be the day the case would settle, and they could begin to move forward. You managed the negotiation all day. Your client is unhappy, and you can't escape being held at least partially responsible.

Every lawyer knows that feeling and has had that drive. Every lawyer has hesitated before picking up the phone to call the client in the next day or two, knowing that it just doesn't reflect well on you, no matter how you spin it. Even if there was nothing more you could have done. It's almost worse than losing at trial because at least there you can say that the judge or jury didn't understand the case or had some other flaw, but here, it was in your hands, you had control, and your client spent the whole day compromising, and that still wasn't enough.

This is a feeling you should not have to have. And the sad thing is that most days, this is unnecessary. You are suffering in vain.

The impasse

Twenty years as a mediator has taught me that most cases can be resolved, and many more than actually do. When everyone at the table thinks there is an impasse, more often than not, it was something that could have been, and should have been avoided, and that responsibility falls to the mediator.

I often wonder who invented the concept of impasse. Who first said, "We are stuck. We cannot go any further."? Who decided that we should give it a name, acknowledge its existence, and make it the scapegoat for all that goes wrong with a mediation or negotiation?

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My guess is that it was the first mediator who had run out of tools. With imagination exhausted, someone threw his hands into the air and declared the negotiation over and decided it was time to send everyone home, declaring an impasse and deeming the mediation process, not just the session, to have failed.

For negotiators to declare an impasse can make sense. The goal in negotiation is to win, so the threat of impasse can sometimes be an effective tactic in achieving that goal, especially in cases where one party needs it to resolve worse than the other. Commercial mediators, however, are hired to settle cases. In this world, *impasse* is a bad word. Moreover, I believe it is a fallacy.

Achieving resolution, by definition, means either avoiding or breaking impasse. If an impasse can be broken, then it was not really an impasse. The reason that impasse is a fallacy is because most of the reasons that mediations fail are because the mediator, and sometimes counsel, didn't do the right things to avoid them. They're not really impasses at all, they're simply a lack of preparation and pre-work.

The fact is, most mediators need to re-examine and refresh their process from the way they convene the mediation, to the way they prepare, and eventually introduce the process, orient people's perspective, manage people's expectations, manage the communication and the negotiation, and right through until the agreement is signed and everyone walks out the door with a copy.

While court mediation programs have done wonders, and have put California way out in front in terms of mediation sophistication – from the advocates to the neutrals – participating in mediations in those settings have also made us all lazy. If we look in the mirror, we all know we could do a better job at researching neutrals, preparing, and in conducting the process. This too goes for advocates and neutrals alike.

But at the end of the day, it is the mediator's job to make a mediation successful. If a mediator's success can be defined by a successful outcome (which may oversimplify the entirety of the mediator's role, but ultimately is the primary goal in commercial mediation), then the mediator is responsible for managing every step of the process with an eye toward anticipating and avoiding the potential for any possible impasse during the mediation.

Here, we will break the process down into five stages, and look at what a good mediator must do, and what a good attorney can do, to forge better outcomes in mediation, and have fewer of those long drives home with a less-than-satisfied client.

Convening

Defining convening as everything that happens in advance of the day of the mediation, then it is surprising how many potential causes of impasse can be avoided by doing things right during this stage.

Impasse often occurs because the right people are not in the room. Good mediators initiate pre-mediation phone calls with counsel – together or individually – and even sometimes with clients and adjusters, if counsel recommends it. On these calls, it is the mediator's job to figure out the nature of the case, and ask who should be in the room, what discovery needs to be completed or what information needs to be exchanged, when the timing will be right to mediate, and how the case should be briefed. These calls can be done before briefing, to arrange for all of the above, and/or after briefing, for the mediator to drill down into specific issues and ask counsel to investigate or clarify issues or damages in advance of the mediation. Good mediators ask a lot of questions and are not afraid to push to better understand all of the dynamics of the negotiation.

Some people, and some institutional clients, simply can't hear information for the first time at a mediation and process it effectively on the spot and incorporate it into their valuation of the case or adopt it into ideas for creative solutions, which can lead to an impasse. Helping counsel prepare for a mediation means sharing briefs, especially in cases that are newer, where counsel need to prepare themselves and their clients for the other side's theories, damage calculations, and reasoning. This is especially important for plaintiffs' lawyers to help prepare the insurance carrier, and to allow them to base the authority they request on the same set of facts upon which the plaintiff is basing their opinion of value.

Helping the mediator prepare for a mediation means also sharing a confidential or "pocket" brief with the mediator, explaining more about the negotiation dynamics, client and counsel relationships, underlying interests driving things, insurance complexities including coverage issues, and anything else that counsel would otherwise want to whisper into the mediator's ear during the day. Having this information in advance helps everyone prepare better and walk in the door more informed than they would otherwise be. Mediators also need to ask for the negotiation history in advance. Few things are more embarrassing to a mediator than bringing the third offer from one room into another, only to hear, "Finally, they're back to where they were three weeks ago when we tried to settle this!"

Another line that mediators often hear is, "I may be able to get more authority, but my adjuster (or supervisor) is on the east coast and has gone for the day." This is something that needs to be discovered during convening. Good mediators ask questions in advance about authority and understand as much as possible about which specific individuals need to be involved in the ultimate settlement of a case. Phone arrangements (desk and mobile phone) need to be made (negotiated) for any decision makers who will not be in attendance. It is a mistake to wait until 5:00 p.m. on the day of the mediation to try to make these arrangements. These are impasses that need to be avoided. And defense counsel need to understand the reason why mediators are asking and cooperate with them in making these arrangements during the convening stage.

Mediations can sometimes end abruptly when one participant has a time constraint. This can sound like, "It's 3:30 and I have to pick up my kids" or "I never thought it would last this long."

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This can be avoided by the mediator reaching agreement with the parties on time expectations and availability. Good mediators ensure themselves an ample window of time, and manage the parties' expectations so that they do the same. Good mediators are the first to arrive and the last to leave, but if they don't manage people's expectations around time availability in advance, everyone can leave frustrated.

Preparation

Preparation is critical to avoiding impasse, but in addition to the mediator, the lawyers and the parties must all be adequately prepared in order to reach a settlement. Each person needs to know enough about the case so that they can analyze settlement proposals and make informed decisions. Failure to prepare, and failure by the mediator to attempt to ensure that the participants do their preparation, leads to an impasse that ends with, "We just don't know enough" or "we need to do more discovery."

Good mediators do more on a pre-mediation call than set the time and date, they dig into the specifics of the case, using their experience to guide them to asking good, probing questions about what additional information each participant will need in order to make a final decision and reach closure at the mediation. Of course, this level of preparedness varies greatly from the discovery necessary to prepare for arbitration or trial.

Should an informational impasse occur despite the mediator's best efforts, it is also part of the commercial mediator's role to help the parties stay on a settlement track, focusing their efforts and their laser-beamed discovery on preparing for a return to mediation. Sometimes this means a little bit of extra, key-written discovery. Other times it means another deposition or two to help figure out what key witnesses or experts will say. But too often, mediators can allow counsel to leave with the idea that the mediation process has failed, leaving them headed back to the litigation preparation track.

Good mediators take the time at the end of a "not settled yet" mediation to discuss jointly with counsel exactly what additional information is needed, the most efficient way to obtain it, and the time frame necessary to do so. Then, taking into account the time necessary for insurance claims management and others to review and take this new information into account, this process should ultimately culminate in a return to mediation date that everyone calendars right then and there.

The mediator's role never changes, regardless of what stands in the way of agreement. The mediator simply continues to facilitate agreement between the parties with an eye toward eventual settlement. Most so-called impasses are really just the next problem to be solved.

Communication

Impasses that simply cannot be pinpointed often occur due to a failure during the communication stage. Simply stated, the mediator may not have discovered or addressed a party's underlying interests. When parties have underlying interests or emotional barriers to settlement, it is common for them not to know what is keeping them from settling. Impasses that result from emotions or unmet underlying interests sound like, "I just don't know. I just know it's not enough." or "I just don't understand why I need to pay that much."

A good mediator knows that this can be the cue to revisit the underlying interests and the emotional resistance – the feelings that are keeping one person from reconciling themselves with the difficult decision that needs to be made. These feelings can be as straightforward as greed, revenge or ill feelings toward or about the other person or the event. But they can also be more subtle and complex, such as unwillingness to let go of a conflict and move on with life, unwillingness to let go of a relationship – such as it is – with the other person, or feeling that they are not being made whole for the pain or suffering they experienced (i.e., no amount of money can make them whole or restore what has been lost).

These feelings need to be uncovered and addressed by the mediator early in the mediation and dealt with then, in order to avoid them getting in the way of a settlement in the later, more stressful stages. Most people attach emotions to conflict and need to reconcile themselves with letting go of those emotions before they can resolve the dispute. Stated simply, readiness to settle can mean really different things for counsel than it does for clients.

Another emotional objection to settlement can be inexperienced participants (and even counsel) who fall in love with their cases. The best analogy is when a person sells their home. They love their home and think it is worth a lot of money because they believe it to be special and unique. However, they have to sell it in a marketplace that is well established, and sets its value based on how it compares to other, similar houses. And, it rarely compares as favorably in an objective marketplace as the owner thinks it should. Enter the realtor, who is supposed to give the seller a more objective opinion of value, but who has the incentive to stretch the valuation more toward the seller's in order to win the competition to list the house and have a happy seller, and ensure that the seller knows that the realtor is on his or her side. However, in the end, the actual value of the house is only that which a buyer will actually pay for it in a market where there are other comparable houses available.

Lawyers and clients who fall in love with their cases, and who lose the ability to see them through objective eyes have to be reminded of the context in which they are attempting to place a value on the case. The context is an informed marketplace where most cases can be measured objectively, and where comparable cases can anchor their value to a norm which theoretically reflects a value based upon what a judge or jury would do, and what risks there might be at trial. Most mediators can talk about the risks at trial, point out the weak points in a case, and discuss costs of litigation, but a good mediator must also ground everyone in reality by bringing a fresh perspective and experience with the objective marketplace in which this negotiation is occurring.

Finally, underlying interests can often be non-emotional. For example,

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they can relate to finances or other, more tangible issues. Answers to these concerns, once uncovered, can sometimes take the form of payment terms or structured settlements. The most common indicator here is when a plaintiff anchors their settlement expectation to something having nothing to do with the case itself, such as their debt, their mortgage, or some other external factor.

The mediation process can become very flexible and creative, making most impasses a fallacy, but only once the parties' real interests are uncovered. However, creativity in mediation works best when it is purposeful and in direct response to a party revealing an underlying interest.

Negotiation

Most of the rest of the reasons for impasse occur as a result of the negotiation process. The primary reason for impasse here is that the mediator played too passive a role in the negotiation process. Mediators need to act as orchestra conductor here, bringing up the strings and down the percussion and keeping everyone together in the same rhythm as best they can. Too many mediators cast themselves as observers in the negotiations, demonstrating no skills, expertise or finesse in helping to keep the negotiation moving in the way it needs to in order to reach a settlement.

The first thing that seasoned mediators know is that the negotiation stage of the mediation begins during the convening stage, as we negotiate together who will attend, when and where the mediation will be held, and what authority will be needed in the room to bring about a complete settlement, and the negotiation continues until agreement is signed. Experienced mediators understand that every demand by counsel, even as early as the convening stage, is part of their negotiation strategy.

Another negotiation challenge is the mediator buying into the bluff. When one party says, "That is our bottom line," what they often mean is that they have not yet been convinced, or given enough information, to change that final position. That statement is heard by the seasoned mediator as, "Knowing what I know now, about the case and about the other parties, I am not willing to move from this position." It might also simply be a negotiation tactic to attempt to scare their opponent.

What can be learned from this perspective is that a "bottom line" is usually just another strategy in the negotiation process. This is not to say that people are not being truthful when they announce a bottom line. Sometimes they are. This is not to say that mediators should not believe people when they say that a particular number is a bottom line or best and final offer. The seasoned mediator knows that this means that this is how they are evaluating the case *under the present circumstances as they see them.* The key to working through this barrier is to help them see things a different way.

Knowing that this bottom line objection may occur is what occasionally prompts some experienced mediators to keep a key case fact or mediator observation in their back pocket. Holding back a useful piece of information in anticipation of such a moment can help everyone. It is a fact that people don't change their minds, but given new information, they are free to make a new decision. This is another way of allowing people to save face and back down from that "final offer" statement by helping them have a legitimate reason to move a little further.

While everyone in the room may be responsible for knowing, understanding and discussing the facets of the case (facts, law, cases, legal climate, and settlement marketplace), there is only one person in the room who is responsible for the big picture. That is the mediator.

The reason that the mediator is in sole charge of this is simple: psychologists would say that the other participants are in a state of conflict. When people's amygdala gets triggered, it literally reroutes brain function from the logical, rational part of the brain into the part that processes emotions. It puts people into fight or flight mode.

When people are embroiled in a conflict, their stress level is high and that can put blinders on them, often without them realizing it, seeing nothing but the conflict. They can lose their peripheral vision which would otherwise allow them to see how this litigation or conflict fits into their everyday lives, their time, their budget, and their stress level. In days of old, attorneys were removed enough to give their clients this perspective. Today, some still are. But today's legal marketplace can demand that attorneys become just as embroiled in the case as their clients are.

What some lawyers gain in intimate knowledge, passion and advocacy effectiveness, they can lose in their ability to remain detached and to see the big picture. The mediator is hired to be the one who is not in a state of conflict, and who is charged with remaining clear and mindful of the big picture, and helping the participants remain that way throughout the negotiation. Some mediators call it "going to the balcony." I think one needs a larger perspective than that. A good mediator needs the ability to see the big picture of the case, the negotiation, and the big picture of the parties' lives and how this case impacts them, their families and their businesses. Injecting this perspective is one way that a case can be made to look different, and bring more of reality into the negotiation.

The key to the mediator helping the parties avoid most negotiating impasses is for the mediator to see them coming. This is the other reason it is critical for the mediator to have a perspective of the negotiation that more resembles that of a helicopter at 5,000 feet. If the negotiation steps by each party are not going to lead to a point of intersection or agreement, the mediator has to see this by the third or fourth move and help to choreograph the negotiation to foresee the potential for impasse and avoid it well in advance.

Mediators can only do this if they understand the science of the math in a negotiation. Each number telegraphs a message. Your mediator should be carrying more than just a number from one caucus room to the other. I call that a naked offer, when it's not draped in the context, the meaning, or the explanation

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that is vital to its complete understanding. Too many mediators leave participants guessing what a number means, and given the conflict they are in, can tend to paint it with the worst of intention and with the most skeptical eye, unless the mediator brings a different message to accompany it.

Additionally, there is still much more going on in the mediator's mind – namely calculating whether the parties are on track to get to an agreement. The mediator must have his or her eye on the finish line at every moment of the process. That finish line, of course, is an agreement containing all parties' signatures. Remember, the deal is not done when there is agreement on a number. The negotiation must include all of the settlement terms, including payment terms, confidentiality (if applicable), release language, and other terms that are important to the parties, in addition to the standard California Civil Code section 1542 waiver and Code of Civil Procedure section 664.6 for enforcement.

This requires the mediator to be multi-tasking. Your mediator must be simultaneously at ground level, toe to toe with the parties, being compassionate and a good listener and discussing specifics about the case, while also stepping back metaphorically to question whether the present conversation is going to help everyone get to the finish line, and then rising up higher yet to lift high above the conflict to see the big picture of the negotiation strategies the participants are employing.

The mediator must be calculating and extrapolating the progress of the negotiation numbers, as well as understanding the impact of the non-economic terms that need to be discussed, when to introduce those terms into the negotiation, and what impact they will have. The mediator must also be mindful of each parties' big picture – their real life and the rest of their business outside of this case, and when to bring those perspectives into the conversation.

Another negotiation impasse that can occur is one I call "looking sideways." This occurs when participants in a multi-party mediation are paying more attention to what another party is getting, or paying, than whether an offer is in their own best interest. This frequently occurs when there are multiple parties on one side of the table – either multiple plaintiffs who will divide a settlement in some fashion, or multiple defendants, such as in construction defect and product liability claims where there can be dozens of defendants contributing to a global settlement. In this instance, one co-defendant will stake out a position that is completely dependent on another co-defendant's offer. For example, one subcontractor will say, "I will pay whatever so-and-so pays, but not a penny more." Or one co-plaintiff will object to a global settlement offer from the defendant(s) because they don't like the distribution of the settlement fund. This isn't a cause for impasse either, it's just the next challenge that needs addressing. It means that someone has a need that has to be met and considered before an agreement can work for everyone.

Looking sideways can also describe when a defendant becomes more concerned with the windfall to a plaintiff, rather than whether the settlement makes economic sense for them. This can sometimes be remedied by including non-economic terms or by paying part of a settlement to a third party, such as a non-profit organization.

When parties are looking sideways, instead of at their own best interest, the mediator has to use an "above the fray" perspective to help that party keep their eye on the ball and decide whether their individual share results in a fair settlement to them, without regard for what others are doing. For example, if a case is settling for a global settlement of $300,000, and one plaintiff feels like he deserves more than an equal division of those funds, the mediator's question to them, keeping the big picture in mind, is whether they are satisfied with their settlement amount when compared to their expectations coming into the mediation, or perhaps whether they're satisfied with their settlement amount as a percentage of the whole, rather than compared to each other co-plaintiff.

One last approach is to ask them what they're going to do with the settlement money when the case is done, turning their focus to spending the actual, tangible money, rather than quibbling over abstract numbers as though it was Monopoly game money. These approaches may make their individual settlement amounts seem fair and relevant to them, allowing them to explain it to others (spouses, parents, adult children, etc.), if that is necessary.

The agreement

Threat of impasse can also come about when the parties are writing the terms of the settlement agreement. One reason to be sure to write a settlement agreement at the end of the mediation, even over the parties' predictable resistance after hours of difficult negotiation, is because the exercise of writing the agreement forces the attorneys and mediator to focus on the details of the agreement, which can often be overlooked during the negotiation stage. If a mediator has not inquired in advance about potential deal points such as confidentiality, payment terms, release language and who will be released, then this exercise can be like a ticking time bomb. Too often, deals blow up at the end where all parties think that they have reached agreement, only to find out once they are tired and anxious to be done, there is a problem with a deal term.

Problems at this stage of the mediation are generally met with rock-solid positions, ultimatums, and emotional parties ready to walk away from the pending agreement unless they get their way, or "win," on this newly raised term. This is a logical result of a compromise process where each party lays out their case and their position in the morning or in advance of the mediation, and then spends the entire mediation stepping back from that position, and then being asked to step back even more in each round. Experienced mediators have seen parties ready to walk away from a hard fought, yet fragile settlement over disagreement on issues such as the number of days until payment will be made.

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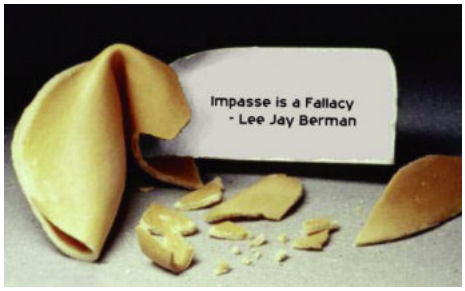
Emotions run high at this stage in the process, and the mediator owes it to the parties to anticipate this and gently raise and negotiate these deal points along the way, when the parties are still in the middle stages of their negotiation, and there is still a willingness to give-and-take.

In short, if a mediator can anticipate common causes for impasse, such as these, the mediator can help the parties to avoid the potential for impasse all together, and find their way directly to a successful resolution.

Finally, if it sounds like the author has all of the answers to avoiding impasse and settling cases, the fact is that even this mediator only settled 92 percent of the cases he mediated last year. And all of this learning comes from mediating more than 1,800 cases over 20 years, and making every one of these mistakes – many more than once. Learning, of course, comes from making



mistakes and looking back to see, with the benefit of hindsight, what caused it and how to avoid it the next time. Mediators learn by experience – by their time in the chair at the head of the table. And hopefully by reading articles that help them avoid such problems by knowing in advance where to look for these bumps in the road.

Hopefully, readers will remember the next time they are staring at a situation that looks like a potential impasse, that what they are looking at is more likely just a signpost that they are simply not finished yet, and that there is more work to do. This just means that it is time to dig down deeper into their toolbox and find the right tool, because most impasses really are a fallacy.

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