



Impasse is a Fallacy

Only those who believe in it fall prey to its trap

By Lee Jay Berman

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?

My guess is that it was the first mediator who had run out of tools. With imagination exhausted, someone threw their 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 impasse can make sense, if you think about it. The goal in negotiation, after all, is to win. And the threat of impasse can sometimes be an effective tactic in achieving that goal. Commercial mediators, however, are hired to settle cases. In this world, impasse is a bad word. Moreover, I think 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. It was something else. But mostly, it was a dare. It was a temptation for the mediator to buy into the bluff that things were stopped dead in their tracks and it was time to give up.

Before examining the notion of impasse more closely, it is important to take a step back and realize that reaching successful resolution in mediation (i.e. avoiding impasse) begins at the very beginning of the mediation process, with convening, and continues until the agreement is signed. Furthermore, 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 an impasse later in the mediation.

Convening.

Impasse often occurs because the right people are not in the room. Effective convening by the mediator – asking a lot of questions and being unafraid to push to better understand all of the dynamics of the negotiation – can avoid this reason for impasse.

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.” This can be avoided by the mediator communicating to the parties his or her expectation about time availability. Good mediators ensure themselves an ample window of time, and manage the parties’ expectations so that they do the same.

Another line that mediators often hear is, “That is all of the authority that I have.” This is something that needs to be discovered during convening. Mediators need not be afraid to ask questions about authority and understand as much as possible about which individuals need to be involved in the ultimate settlement of a case. This is also the point in the mediation where arrangements need to be made (negotiated) for telephone availability of any decision makers who will not be in attendance. The common mistake is to try to arrange this at 5:00 p.m. on the day of the mediation as people are leaving their offices for the night. What is worse, is that 5:00 p.m. on the east coast occurs in the mid-afternoon in the western states. It is the mediator’s job to work this out, to the greatest extent possible, during the convening stage.

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.”

While informational impasse can be avoided by preparing adequately, and having the mediator facilitate the exchange of information prior to the mediation, it is part of the commercial mediator’s role to help the parties stay on a settlement track and continue preparing for a return to mediation, rather than leaving with the idea that the mediation process has failed, and returning to the litigation preparation track.

Should this informational objection occur, the mediator has a responsibility to the parties to help them figure out exactly what critical facts they need to discover or what elements they need to research so that they will know enough to make an informed settlement decision. This level of preparedness varies greatly from defining what discovery is necessary to prepare for arbitration or trial. 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.

Once these items are agreed upon, then the mediator must turn the discussion to time, and how much time is necessary to complete this specific discovery and process it with decision makers (including insurance claims management, if necessary). The mediator and parties are then ready to agree upon a date to return to mediation to continue their settlement negotiation. 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.

Communication.

Impasses that simply cannot be explained 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 be as straight forward as greed, revenge or ill feelings toward or about the other person, or they can 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.

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 that values it based on how it compares to other, similar houses. And, it never 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. T 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. A good mediator must also bring those people back to reality by reminding them of this objective marketplace in which this negotiation is occurring, and what that market will bear.

Finally, underlying interests can be non-emotional. For example, 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 mediation process can become very flexible and creative, but only once the parties' real interests are uncovered. However, creativity in mediation should be 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 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 party(ies), I am not willing to move from this position." It might also simply be a negotiation tactic to attempt to scare their opponent.

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 see every demand by a party, even as early as the convening stage, as a negotiation strategy.

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.

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: behaviorists would say that the other participants are in a state of conflict. When people are embroiled in a conflict, their stress level is high and they tend to put blinders on, looking at 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 able 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, too. 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.

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. While the mediator should be carrying more than just a number from one caucus room to the other, 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), and other terms that are important to the parties.

This requires the mediator to be multi-tasking. The mediator must be compassionate and a good listener, while also rising high above the conflict to see the big picture of the negotiation strategies, and higher yet to question whether the present conversation is going to help everyone get to the finish line. 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 bring those terms into the discussion, and what impact they will have on the negotiation. 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.

Knowing that this bottom line objection may occur is what occasionally prompts some experienced mediators to keep a key case fact in their back pocket. Holding back a useful piece of information in anticipation of such a moment can help to overcome the, "I need more information" and the, "Knowing what I know now", and, "The way the case looks to me right now" objections. It is an old adage that people do not 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.

Another negotiation impasse that can occur is one I call “Looking Sideways.” This occurs when participants in the negotiation are paying more attention to what another party is getting, 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 it provides more money for another co-plaintiff than for them.

Looking sideways can also describe when a defendant becomes more concerned with the windfall to a plaintiff, rather than whether the settlement makes sense for them. This can sometimes be remedied 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 single family construction defect case is settling for a global settlement of \$300,000, and one subcontractor with mid-sized exposure is contributing \$30,000 to the settlement, they can become more focused on whether another mid-sized subcontractor is contributing \$25,000 or \$35,000. The mediator’s question to them, keeping the big picture in mind, is whether they are satisfied with a contribution of ten cents on the dollar of the global settlement. Chances are that setting the contribution in this context may make it seem fair and make sense to them, allowing them to explain it to others, if 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, in particular, to focus on the details of the agreement. 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 that when they are tired and wrung out, frustrated 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. Experienced mediators have seen parties ready to walk away from a hard fought, yet fragile settlement over disagreement of a week or two in the time the settlement payment will be made. 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 stage 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% of the cases he mediated last year. And all of this learning comes from mediating over 1,000 cases over 12 years, and making every one of these mistakes. 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 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 they are simply not finished yet, and there is more to do. This just means that it is time to dig down deeper into their toolbox and find the right tool.

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