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Breaking Down the Barriers

10 Tips for overcoming a commercial mediation impasse

By STEWART EDELSTEIN

It is 3 p.m. in your one-day mediation of a commercial dispute. Despite good-faith negotiations and diligent efforts by both parties, the lawyers, and the mediator, the parties have reached an apparently insurmountable impasse. This is the decisive moment. Do the parties resign themselves to litigating through trial, and possible appeals, or do they overcome that impasse and achieve resolution now?

If the parties have chosen a mediator who applies impasse-breaking strategies, resolution is possible, even when apparently unlikely. This article provides impasse-breaking tips you can suggest even if the mediator doesn't. After all, when a mediator sees resolution slipping away, it's not uncommon for the mediator to ask: How do you suggest we achieve resolution?

Challenge perceived BATNA. The mediator may challenge your perceived best alternative to a negotiated agreement (BATNA). If your BATNA is unrealistic, your position may be more extreme than it should be. Well before the mediation, analyze your BATNA and discuss it with your client. Play devil's advocate to focus on weaknesses in your position.

When the mediator challenges your BATNA, you may want to challenge the other party's perceived BATNA, because, if that is unrealistic, the other party should be more flexible.

Challenge perceived WATNA. WATNA is a party's worst alternative to a negotiated agreement. The mediator may challenge your WATNA on such matters as likelihood of success as to each cause of action; the amount of damages that may be awarded and recovered, the amount of future legal fees, and likelihood of success on any counterclaims. As with BATNA, analyze your WATNA well before the mediation. Also be prepared to challenge the opposing party's apparent perceived WATNA.

Focus on non-monetary factors. Expect that the mediator will encourage the parties to bridge that final gap by emphasizing the non-monetary as well as monetary benefits of settlement. Do the parties have an interest in preserving their business relationship for their mutual advantage? If so, a handshake and signed settlement agreement are far preferable to months of potentially acrimonious litigation. Do the parties have an interest in preserving the confidentiality of the subject matter of their dispute? If so, that confidentiality is lost in litigation.

Consider suggesting that the decision-makers meet elsewhere, possibly over a meal or drinks, to enhance the likelihood of greater flexibility in positions.

Do the principals want to suffer the disruption, inconvenience, and anxiety of litigation, with its uncertain result, over many months, at great expense? Or would they rather enjoy the benefits of immediate finality, so they can devote their energies to running their businesses?

Change the players. The negotiators may have become so entrenched in their respective positions that they are unwilling or just too stubborn to be open-minded about settlement alternatives. One way to break through impasse is to change the players. Variations include the principals meeting without lawyers; lawyers meeting without principals; experts meeting with each other; and one person meeting with the opposing team. Remember, though, that even though a mediation is confidential, the information disclosed and admissions made, other than settlement positions, can be used in legal proceedings unless the parties otherwise stipulate.

Change the venue. Typically, the mediator engages in shuttle diplomacy between conference rooms in a formal setting. In that venue, it can be easier to take "hard" positions than in a more relaxed setting. Consider suggesting that the decision-makers meet elsewhere, possibly over a meal or drinks, to enhance the likelihood of greater flexibility in positions. Of course, you can change the players *and* the venue simultaneously.

Ask: What if? Be prepared for the mediator to ask both parties: "If I can get the opposing party to alter their settlement position by $X, how much are you willing to alter your position?" By this process, a mediator attempts to narrow the gap to the point that any remaining dispute is negligible. Be sure to obtain your client's consent before answering this and any other settlement position questions. This may be an opportune moment to highlight for your client all the risks and costs of litigating to the bitter end – your WATNA, as well as the non-monetary factors that militate toward settlement.

Cut to the chase. Be prepared for the mediator to ask: "How far are you willing to go to settle this case?" Make sure you have your client's authority to answer this question, which you should have discussed before the mediation, although the answer may change during the course of the mediation. The mediator will ask the same question to the opposing party, to determine whether the par-

Stewart Edelstein is chair of the Litigation Department at Cohen and Wolf P.C. He works out of the Bridgeport office.

ties are close enough to make it worthwhile to attempt to bridge the final gap.

Accept the "double-blind" proposal. If both parties agree, the mediator presents to each party a "double-blind" proposal, by which the mediator confidentially presents the same final number to each side to accept or reject. Be prepared to give your final offer or demand.

Take a break. If the mediation has developed momentum toward resolution, a break can slow down that momentum. However, once you reach impasse, a break can provide a welcome respite for everyone involved, during which they can re-evaluate their positions. After the break, rejuvenated, the parties or the mediator may come up with a fresh approach, some creative way to break through impasse.

Resume another day. This is the last resort, when all else has failed. It is possible that one party needs more information before completing the mediation process, or that one party wants to consult with someone as a result of the mediation thus far. Or it is possible that the parties need a "cooling off" period before resuming.

Renewed mediation can be by telephone, another meeting, or by any other exchange of information. Whatever process the mediator and parties adopt, imposing a deadline at some point is advisable, to bring things – finally – to a head, to either settle or try the case. Of course, if mediation fails, arbitration is an option that should be considered, especially if the parties require confidentiality.

Conclusion

These impasse-breakers are not mutually exclusive, nor are they the only ways to break through impasse. Use whatever combination of strategies that may be productive in your mediation. You are limited only by your imagination and your client's authority. If you do reach resolution, be sure to have the parties sign a settlement agreement before leaving the room. (Consider drafting the boilerplate language on your laptop before the mediation begins.) Otherwise, you risk misunderstandings about the settlement terms, or "buyer's remorse."

If the settlement agreement is complex and the best you can do before leaving the mediation is to draft a term sheet, include a provision that the mediator's ruling on the settlement terms is final, and make sure both principals, and their attorneys, sign it. Your goal is finality.

If you adopt these strategies successfully, you can take satisfaction in these words of Abraham Lincoln: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity . . . . There will still be business enough." ■