THE DREADED IMPASSE: POSSIBLE WAYS OF AVOIDING IT

By Joan Stearns Johnsen

Mediation serves a valuable purpose regardless of the outcome. Everyone learns more about the case. Even though mediation is not an opportunity for free discovery side, through the process of risk analysis directed by the mediator, everyone invariably gains insights into their own and their adversary's case. Clients unfamiliar with the formality and emotional strain of litigation learn first hand about the rigors and intensity of the process. Actually living through mediation is a much better introduction to litigation than any description in the lawyer's office. Thus, even when mediation results in impasse there has been value added from the process.

However, mediations are intended to settle cases. Lawyers and parties spend valuable time and money because they expect a result. Everyone works towards that result and in most cases settlement is reached. In spite of the benefits achieved when settlement is not reached, no one hires a mediator indifferent to whether the day concludes with an impasse rather than a settlement. Impasse is something everyone wants to avoid when choosing to mediate. Mediation is an art not a science and there are as many ways to avoid impasse, as there are personalities and fact patterns. Here are some ideas of how to get across the finish line and get what you paid for.

I believe, first of all, that the best way to avoid impasse is to anticipate it. This of course will not work in all instances, but if you prepare thoroughly, you may be able to figure out where the problems are likely to arise. One impediment to settlement that can be anticipated is what Suzanne Mann Duvall of Dallas, Texas refers to as "phantom parties." A phantom party is someone who although not actually present at the mediation will torpedo your mediation just as your client is about to sign on the dotted line. Your client understands why he or she is settling and intellectually can appreciate why the deal is one that should not be passed up. Just prior to forever releasing all claims the party seeks validation from a trusted ally and wham, you have an impasse. Or perhaps your client doesn't speak to the phantom party; in fact he or she fears speaking to the phantom party and being "second guessed." The Phantom Party can be any of a number of people. Most frequently it is a family member. It can be an advisor of any sort.

Just being aware that such individuals are out there is helpful. Probe when you interview your client. Determine whether your client honestly will be able to make a decision independently. If you have concerns, it may be a good idea for the phantom party to participate in the mediation. I say it may be a good idea, because you don't want the phantom party derailing your mediation either. But in most cases there is a distinct advantage to having the wife, mother, son, or whoever present. Let that person participate in the process and also understand why the deal may actually make sense. Allow the advisor to ask questions and learn so the advice when given is informed. Yes the phantom party may be someone you would prefer not to deal with, but he or she is

there whether you like it or not. Their influence must be managed, not ignored. You will never have full settlement authority until they give their blessing.

To avoid a premature end to your mediation, send your client into the mediation well prepared. This includes explaining that the mediation will be emotional. Let them know that they may hear things that make them angry. Sorry. Litigation tends to be uncomfortable and unpleasant. You may also mention that mediation is unlikely to be anywhere near as intense or infuriating as the hearing. Tell your client that mediation is a process. There will be both an exchange of information and of offers and demands. Sometimes attorneys fail to empathize with their clients' possible unfamiliarity with the mechanics of negotiation. The first number is presented and a party will respond with supreme disappointment. They begin to pack up since the number offer is unacceptable. Those of us who engage in this process regularly take for granted the fact that the question of acceptability applies to the best and final number, not to the first number.

In addition, parties should be prepared by their attorneys to have realistic explanations as to what is a possible result. There is no benefit to either the process or to the client by setting unrealistic expectations. Realistic expectations should directly relate to what a likely outcome will be at arbitration. Your adversary will be similarly evaluating the case. A rational settlement is necessarily where the two evaluations intersect. Setting unrealistically high or low expectations doesn't get you a better result. Realistic expectations don't prevent you from aiming higher. The risk of sending your client into a mediation with unrealistic expectations is that at some point it may be necessary to either adjust the expectations of your client or pass up a potentially rational settlement and succumb to impasse.

I think this approach makes sense both from the standpoint of good mediation advocacy and from that of solid business practice. Setting realistic expectations does not prevent a party from attempting to achieve better than expected results. However, it does enable the party to understand when the lawyer has achieved a superb result. It would make the party appreciate a truly exceptional result if the expectations are realistic. It is better to exceed expectations than to have to adjust them at a later time.

Another way to avoid an impasse at the mediation is avoid "overlawyering" prior to the mediation. It is wise to mediate early in the process before excessive expenses that may prove an impediment to resolving the case have been incurred. Mediating early means that both sides know their case even though they may not be ready to go into the arbitration. The lawyer does have to know what the case is really about and what realistically will and will not be likely to be provable at hearing. Every bit of evidence does not have to be ready to go. Separate in your own mind argument and theory from what can be proven. Do not spend so much on preparation that any recovery has to include thousands of dollars spent on trial preparation. The value of the case will be based on trading losses and damage analyses relating to your client's securities account. It is unlikely that your adversary will be willing to compensate your client for expenses too. Overlawyering is a potential cause of an impasse. Avoid creating a situation where

a settlement offer that is fair based on the various damage analyses is insufficient due to the expenses already expended.

Be prepared to mediate. This is different from being prepared to litigate. The fact that it is mediation does not mean that you can give the case a cursory glance. Do not postpone preparation until the actual hearing unless you really do want to have a hearing. Think about your opening statement. Prepare what you will say to your adversary so you make the most of a valuable opportunity. Focus on the strengths and weaknesses of your case. Anticipate impediments to settlement. Spend time with your client preparing them for what to expect. Give some serious thought to an appropriate damage analysis and negotiation strategy for mediation as well as for the hearing. Unfamiliarity with your case will lead to insecurity about the offers and demands. You must know with certainty what the net out of pocket losses are. Damages may or may not be the same number. Knowing the actual losses and formulating your damage theory are critical to effectively negotiating a settlement as well as to knowing a good deal when it is presented to you. Failure to prepare is a way to sideline a mediation.

Do not confuse litigation advocacy with mediation advocacy. It is appropriate to slant facts, be argumentative and to demonstrate total confidence in your position at the hearing. Painting an unreasonably rosy picture of the likely outcome is not the best way to conduct private sessions of a mediation. Unless you have an evaluative mediator or an early neutral evaluator, there is no point in unrealistically raising the expectations of your client. In mediation, your objective should not be to persuade the mediator. Your objective should be to settle your case. That requires an honest view of your case and the ability to negotiate effectively. Posturing too vigorously in private sessions for the benefit of the mediator may have the undesired effect of persuading your client. The client may not be willing to accept a reasonable settlement if you have succeeded in convincing him of how successful your arguments will be at a hearing.

Be flexible. There is more than one way to negotiate. Remember that you can only control your own style of negotiation. You cannot control the conduct of your adversary. You hurt your own chances for reaching a settlement when you respond to the style of negotiation of your adversary. It is entirely possible to reach a resolution with someone you don't like, don't respect, and don't agree with. Don't lose the war over hurt feelings regarding style. Just because the other side does not respond to your demand the way you want them to is no justification for ending the negotiation. Rather than attempting to change the way they negotiate, attempt to understand it so you can respond appropriately. The negotiation portion of the mediation is a way of communicating with the other side in numbers as well as words. Figure where you think they are going and why you think they are going there. Look past the style to the substance. Listen for messages delivered with the number. Learn to read between the lines. It is in your interest and ultimately in the interest of your client to work with your adversary.

There are several negotiating techniques to fall back on when all else fails, but only when all else fails. I don't advise parties to take the easy way out initially because I believe an advantage of mediation is the ability to retain control of the result.

One impasse breaking technique is the Mediator's Solution. This is a great method to use when all else fails, but should not be the method of choice in all situations. With the mediator's solution, the parties allow the mediator to pick the point at which the case should settle. The mediator allows the parties to either accept or reject the number. It can be used to break a deadlock or to speed up the negotiation. It should not be used too early in the process even though it saves the parties a lot of stomach churning. Even though the parties give up control of the final number, it is still better than the award of an arbitrator, because it can be rejected. But it is not the same as retaining control over the negotiation and possibly obtaining a better result through hard work. Nevertheless, there are those situations when the Mediator's Solution is definitely called for.

When parties are somewhat unsure of an appropriate settlement range, it is possible to explore ranges rather than numbers. By establishing an appropriate range, the parties can see that a resolution is in fact likely. A range can also narrow the possibilities. Without actually putting a specific number on the table the parties can explore with one another where there is a possible overlap of ranges. This may be very helpful to explore the value of the case. Without a realistic view of the value it is impossible to reach a resolution.

Another technique when parties are very far apart is the conditional offer and demand. When parties refuse to move in anything other than minute steps, the conditional offer allows two steps to be accomplished in a single round. The first party places a number on the table. However, there is a second number disclosed only to the mediator. The second party will only receive the second number if he is willing to make the requested move. Sometimes the mediator refuses even to disclose the second number unless the second party makes the requested move. This can sometimes be dangerous if the secret number does not reflect a substantial enough move.

There are many other creative techniques such as baseball mediation where the parties each select a number and the mediator chooses one of those two possibilities as the final recommendation. This can give one party a serious reality check if he has not realized up until this point how unrealistic he may be in his negotiation. In regular baseball, each side knows the other side's number. In night baseball, only the mediator knows both numbers. Besides the fact that the parties are relinquishing control to the mediator, another drawback with this technique is that at the end of the negotiation when this technique is usually used, the parties may have a sense as to how the mediator views the case. It may be clear as to which number is likely to be selected.

CONCLUSION

Negotiation like litigation is hard work. Sometimes the best way to avoid impasse is just to keep working. Parties come to mediation because they are willing to settle. The issue is always for what. Don't be quick to give up until you find the right place for your settlement. Both parties have the same case and there should be an appropriate place to meet if you are willing to engage in some hard work. You don't fail until you actually give up, so don't give up. Revisit, reconsider, back up and try again. Try something you have never tried before. Just because you have always negotiated a certain way doesn't mean you can't try a different way.

Rationally it should be possible in every case to reach a settlement because it is in everyone's best interest to do so. If everyone views their case as objectively as possible the two cases will be one when viewed by an objective third party such as an arbitrator. By making reference to the only other alternative to settlement, the arbitration, it is absolutely possible to find an appropriate range for a settlement and then keep working towards resolution. Sometimes this process is more painful and protracted than this simplified description sounds. Sometimes a client needs education; sometimes a lawyer needs education; sometimes everyone needs some education. Just as with everything in life, there are no deep dark secrets to achieving success. You can usually reach your objective with hard work, patience and perseverance. Good luck.

Joan Stearns Johnsen is a mediator and arbitrator located in Boston, Massachusetts. She is a member of the NASD and NYSE panels.