Alternatives
TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute For Conflict Prevention & Resolution

VOL. 29 NO. 1 JANUARY 2011

Mediation Skills/*Part 1 of 2*

Avoiding the Impasse, Closing the Deal

BY WILLIAM A. DREIER

Educated mediators need to be able to analyze barriers to settlement. They need to understand whether the barrier comes from a lack of information, the psychology of one or both of the parties, or mistaken analysis.

That's the common ground in the theory books described in the box on page 7. All provide bases for mediators to correctly interpret manifestations of the barriers, and to determine the neutrals' interventions that can help break those barriers down and produce a settlement.

This process should be understood before a mediator applies a particular mechanical technique to "close the deal." It is not enough for a mediator to assess what appears to be an unrealistic offer or demand from which a party will not retreat—even when the mediator inwardly labels the party as unwilling to negotiate, or even pigheaded. The refusal to move could be emotional. It could be caused by a different way of life or criteria for evaluating ideas. These differences are probably the hardest to deal with.

But the failure to proceed also could be based on misinformation or different data interpretations. A mediator can be effective in clearing up these problems. Often the difference is caused by mistaken perceptions of self-interest, focusing on the past rather than the future. A party may be holding on to monetary losses or psychological harm which, with deeper analysis, may show that the party feels it will never be fully compensated; or has failed to realize the financial, psychological, and exposure relief that a settlement may afford.

The author is a member of Norris, McLaughlin & Marcus, PA, in Bridgewater, N. J. He is a retired Appellate Division Presiding Judge, New Jersey Superior Court.

Too often, parties are too in love with their own cases. Their positions have been extolled by their attorneys, friends, and family. They don't realize how a neutral judge, jury, or arbitrator, without the parties' psychological baggage, might view the matter.

A mediator should help break through these impediments.

All of these factors have effects throughout the mediation process, but come to a head when the parties are at or near what they perceive as their final demands and offers.

There are several effective approaches for defeating impasse, but they cannot just be sprung on the parties individually, or in a series, without the mediator understanding the mindsets of the individuals he or she faces. It is for this reason that the textbooks in the accompanying "Theory on Impasse" box are worth at least one or more close readings, until the mediator understands the techniques and how each applies to the underlying causes of the impasse.

The prototypical personal injury mediation case presents an unequal dynamic. It usually pits an insurance company against a relatively unsophisticated and financially insecure individual.

There are exceptions, of course. The plaintiff may be wealthy. The defendant may

(continued on page 7)

Alternatives DOI: 10.1002/alt.20325

other decision-making authorities are proving to be the most effective means of resolving the existing disputes.

Often, the real core of the conflict is not resolved by the decision of a Slovak authority. In fact, frequently, the judicial authority's final decision sparks another conflict or dispute.

A way out of this vicious circle is mediation, because it addresses aspects of the dispute beyond the legal issues. A mediator, as an impartial and independent party, is also helpful in dealing with conflict, understanding its causes, and seeing the barriers to its resolution, as well as in helping the parties reach a mutual understanding.

That idea seems to be a taking hold, and slowly translating to practice, in the Slovak Republic.

* * *

Next month, Worldly Perspectives visits Greece.

Mediation Skills

(continued from front page)

be a struggling commercial entity or an individual who is uninsured (or face a case that falls within a policy's deductible).

Usually, however, the insurer or self-insured manufacturer, trucker, etc, calls the shots, because it makes little difference to it whether the case settles or not. Once negotiations reach a reasonable settlement range based on probable results in court, all that is on the line is the transaction costs—that is, the experts, the attorney's fees, and any additional discovery costs.

If the defendant settles all of its cases or tries them, the good results will balance the poor. To such defendants, the savings of costs and assessment of the actual risk are the keys.

Plaintiffs have a completely different dynamic. If the case is lost, the costs, while technically payable by the individual, often are absorbed by counsel for the simple reason that most plaintiffs cannot afford to reimburse counsel for the tens or even hundreds of thousands of dollars invested in the case. And their plaintiff's counsel bears the total risk on fees, except in the rare case where there is hourly compensation.

Most telling is the fact that the plaintiff has this one case and cannot average the good and bad results of thousands of similar matters. Once the settlement offer reaches even a low-reasonable range, the plaintiff's pressure to settle is intense. Added to the plaintiff's concerns is that if a reasonable settlement is rejected, a jury may low-ball or even find for the defense; add to this the pressure from the plaintiff's attorney, whose fee is on the line.

Some counsel may be more in the position of the insurer, because good recoveries can be balanced against bad. Often, however, the plaintiff's counsel is not a regular participant in personal injury litigation and his or her inventory of cases is too small to invite averaging.

Therefore, whatever bravado may be put forth by a plaintiff, or whatever defense counsel may say, the dynamic is that a reasonable plaintiff usually must take an offer that falls within the reasonable range. This means that the plaintiff must convince the defense that the probable trial result is higher than what the defense originally perceived.

While jury research studies present ranges, the carrier will not be impressed by the high end; averages or the low end are where settlement offers are usually found. One expression and belief is that carriers offer only low-hanging fruit for which plaintiffs can reach. While a verbal description of the risks and benefit usually suffices for personal injury mediations, in more complex cases, a decision tree analysis should be deployed to provide settlement perspective.

These cases must be distinguished from employment cases, business torts or contract mediations, where there are different dynamics. These are often like mini-divorce cases. There are thwarted expectations, accusations of infidelity, and accounting issues as the relationships are untangled. The techniques to be applied in these situations are examined below.

(continued on next page)

The Theory on Impasse

Various texts have focused on the nature of the conflict giving rise to the impasse and the actions—that is, the interventions—that might be initiated by a mediator to resolve the problem.

Prof. Harold I. Abramson of the Touro Law Center, in Central Islip, N.Y., in his book *Mediation Representation—Advocating in a Problem-Solving Process*, published by the National Institute for Trial Advocacy (2004)(a new edition was released last year), analyzed several of the academic approaches to impasse resolution. Among these is an earlier edition of the fascinating five-part conflict analysis by Christopher W. Moore, who, in a "Circle of Conflict: Causes and Interventions," breaks the issues into conflict of interests, conflict of structure, conflict of values, conflict of relationships, and conflict of data, each with separate underlying causes, and "interventions" open to a mediator to counter each of these causes. Christopher W. Moore, "The Mediation Process—Practical Solutions for Resolving Conflicts," 64–65 (3d ed. Jossey-Bass 2003).

Additionally, Prof. Abramson describes a 10-cause impasse analysis. A book by Prof. Dwight Golann at Boston's Suffolk University Law School, divides impasse causes into process obstacles, psychological barriers, and merits conflicts. In *Mediating Legal Disputes* (ABA 2009), Golan adds a discussion of psychological issues to these areas before treating impasse techniques.

Similar approaches can be found in the 2008 book, "The Practice of Mediation—A Video-Integrated Text," by University of Pennsylvania Law School Prof. Douglas N. Frenkel, and University of Connecticut School of Law Prof. James H. Stark.

If an individual mediator has the time and inclination to read and understand these approaches, they provide a foundation for individual case insight and a facility for working with litigants and counsel.

—William A. Dreier

Mediation Skills

(continued from previous page)

Put aside for now the structural impasse of a defendant or its representative, such as an insurer, who has absolute but unrealistic dollar or other limits on the offer. The limit may be placed by a person at the table, or more often, by an individual or committee who is not participating in the mediation and is uninfluenced by the realities that have been discussed. A summary may be telephoned back to headquarters, but it often is quickly dismissed.

Of course, there are the equivalent intractable plaintiff's demands set at multiples of the case's fair value. But at least the plaintiff is there. There is a chance that reason can prevail over a jackpot mentality once the mediator identifies a possible misinformation source, such as plaintiff's attorney, family, friends, newspaper articles, etc.

If an impasse is to be broken, it is best that those who have created the impasse be present so they can be dealt with. Sometimes these absent figures can be brought to the mediation via speakerphone or videoconference. Too often the only contact is a telephone relay, and the mediator can only hope that the flavor of the proceedings and progress made is accurately transmitted.

Such a conference is a mediation in name only, and is frustrating to all but the perpetrator, who often thoroughly enjoys thwarting the process.

As often as these structural blocks occur, more often, mediations occur because people and parties want to settle. This article covers techniques to deal with the problems that thwart, temporarily, the better resolutions parties and neutrals seek in mediation, written mostly from a personal injury case perspective, but broadly applicable to commercial cases.

FACE REALITY

A reality check can be used to correct misapprehensions of law or facts. When the mediator notes that one side or the other has an unrealistic view of the law, the mediator should proceed somewhat warily.

The errant lawyer might be privately taken aside for a discussion of the basis for the legal dispute, whether it is an overlooked statute, a case or article, or even an evident foundation for a question where the attorney had thought none existed. Examples may be the total loss of a plaintiff's rights where his or her responsibility is more than 50%, or the failure to realize that minority and marketability discounts may or may not apply when valuing corporate stock.

Attacking the attorney in front of the client can be counterproductive. A mediator needs the attorneys as allies, not adverse to the process.

Where there are factual mistakes—as opposed to factual disputes—again, the mediator must tread carefully. If a study of the file shows that one side has overlooked or misread a material fact, it is best for the mediator to feign a lack of understanding and ask for an explanation, bringing in the reference. Often, the mistake will be realized, and the neutral can then compliment the party or attorney for reconsidering a position based not on what was found, but on what the party or attorney has discovered.

Breaking Through

The issue: Parties + their mediation baggage = impasse.

The blame: The parties' lack of information, psychology, or mistakes. And mediators' inability to deal with the problems.

The assistance: Reality checks, Batna/Watna, and assessing damages better. More impasse-busters next month.

In personal injury mediations, defense counsel often are accompanied by annuity specialists. The use of annuities can make lower settlement more appealing. The tax ramifications of a structured settlement depend upon the cause of action settled. Although this author is not a tax specialist—and thus a tax attorney or accountant should be consulted—note that IRS Tax Publication 525 indicates that personal injury and accompanying emotional distress is not taxable, nor is an annuity dependent upon those factors.

But settlements for lost wages are taxable, as are punitive damages and attorneys' fees for any taxable sums received. The benefit of the annuity is that all future payments, which include substantial accrued interest that would have been taxable to the recipient if the award had been paid up front, are also not taxable. The recipient receives far more over the life of the annuity and can even direct up front that lump sum payments be made at times when the recipient expects that there will be monetary demands, such as for future education or other anticipatable costs.

Although an extra $50,000-$100,000 may be sought, now, giving up these additional amounts may be far preferable to a possible and devastating downside if a jury returns with a "no cause" verdict.

BATNA/WATNA

This technique's cryptic title adopts "Getting to Yes" terminology. Roger Fisher and William Ury, "Getting to Yes: Negotiating Agreement Without Giving In" (2d Ed. 1991). Batna is the "best alternative to a negotiated agreement." Watna is the "worst alternative to a negotiated agreement." This impasse-defeating technique involves dealing with each of the parties in the caucus sessions and by looking forward (see "Forward-Looking Interests" below), having them recognize what the best and worst situations might be if they do not settle.

This method is usually used when there is a reasonably narrow range separating the parties, but can also be effective earlier in the session when asking a party to take a bigger step toward a settlement.

If there is a bankruptcy threat, or a substantial loss of an interest in a business, or a jury coming back with a "no-cause" verdict, they can be measured against paying slightly more or accepting slightly less than the offer or demand now on the table. Often monetary settlements can be phrased in terms of the good that they will do, such as a child's education, more security in retirement, augmenting income or the like. See the "Gambling Analogy" section below.

ADJUDICATION IS UNPREDICTABLE

Judges, juries and arbitrators are unpredictable. There are no such things as 100% claims

or defenses. If the case were really that strong, then a summary judgment would have entered long ago. The judge, jury or arbitrator likely won't see the case the same as the party or attorney. It can be explained to the party that it has been reinforcing its view of the case over and over since it arose, and the other side has been doing the same. The neutral will have to reconstruct the facts solely from the presentations that are made.

Furthermore, in a mediation the parties have the opportunity to fashion relief in a way that a judge, jury or arbitrator cannot do. It is arguably ADR's greatest strength, along with cost savings. In court, there will be no payment terms or annuities or variable interest rates; there are no side benefits that can be conferred or other possibilities that can be tailored to fit the particular case. A failure to settle cuts off the parties from such useful tools.

Adjudicators also vary tremendously in their innate abilities and personalities. The parties can control the settlement but not a fact-finder who goes astray because the particular testimony was misunderstood or because he or she just did not believe what one party or the other thought was a credible witness. Parties, witnesses and experts may become flustered and not testify as expected. The courtroom can be a very uncertain battleground.

DAMAGE ESTIMATIONS

In personal injury cases and simple breach of contract matters, the parties often are looking to the mediator for validation of their damage estimates. But as soon as an evaluative mediator puts a number on the table, a two-party mediation turns into a three-party process. Each of the parties and the mediator then fight for their own figures.

If the mediator follows a facilitative approach, there will be a gentle nudging of the parties toward settlement, but without a dollar figure being advanced by the mediator often until the very end. There are several factors, however, that the mediator can point out that will affect how the parties look at whatever numbers are demanded or offered.

Transactional Costs: What will the litigation cost the parties in attorney fees, expert fees, deposition costs, lost time for the party's corporate executives and the like? If the matter is being presented to arbitration in the event of a failure at mediation, there may be sizeable arbitration fees. If the matter goes to verdict or award, there may be extensive interest charges and even the award of the adversary's attorney fees, if warranted by the particular claim. Although the parties may bargain to include some of these fees in a settlement, often settlements are reached with all or most of these costs either reduced or waived.

There are many cases in which the combined fees of both sides end up being greater than the difference between the offer and demand. It makes no sense for such as case to proceed.

These cases, however, still reach impasse, often because the parties have unrealistically viewed the costs as well as the probability of ever fully achieving what they are asserting in their claims or defenses. A good analysis of the transactional costs when dealing with an impasse can be combined with any of the other damage estimation factors to put a settlement back on course.

Item-by-Item Damage Assessment: Often the parties will present a list of damages, and then add them up to justify a demand or offer. When the mediator goes over these lists with the parties, there may be a great difference when a realistic probability is assigned to each item. This is especially true in commercial cases where there may be a wide swing in dealing with discounts or valuations.

By singling out individual elements, the mediator often can bring reality into the situation, especially if there is another way of assessing a particular item, such as an impartial expert, discussed below. Remember, however, that in the final settlement, the parties do not have to agree on each point, only on the total. See "Black Box" Analysis below.

Tax Implications: Often the parties will overlook the tax implications of their offer or demand. The mediator probably won't be a tax specialist—and, if not, should not hold himself or herself out as an expert. Still, there are well-known tax benefits to certain types of settlements. A proper allocation of a settlement to a bodily injury will carry with it a freedom from federal income taxes, but there must be a basis for such a claim.

Accepting an annuity directly from the defendant's insurer radically changes the taxability of these proceeds, which build up within the annuity tax free at reasonable interest rates. Negotiated or scheduled lump-sum payments can be made at intervals to defray education expenses or other anticipated needs for proceeds. Allocating a commercial settlement to a buy-back of corporate stock may achieve capital gains treatment for what otherwise might have been ordinary income.

But in all of these cases the structure must be understood and advice obtained from a tax attorney or accountant. Sometimes, the expert can be called directly from the session and help resolve a knotty issue. These tax benefits alone may break through an impasse.

Resort to Accepted Outside Standards: This help with estimating damages often is overlooked. In personal injury claims, there are jury verdict research services which can provide guidelines, but the caveat being that each case must be viewed to see how similar it is to the one with which you are dealing. One broken leg can be 100 times more serious than another. There are a tremendous number of variables, but the services are still helpful.

Another outside standard may an independent accountant, appraiser, engineer or other professional. At times the parties will agree to consider the expert's conclusions. On other occasions, the parties will agree to be bound by the valuation. Often, the expert can be chosen by the parties' own experts, if they can agree, and if not, they may ask the mediator to suggest the independent expert. On still other occasions, when the mediator has been called in early enough, the parties may even use an independent expert in lieu of paying fees for partisan experts.

In the impasse situation, however, the use of an impartial expert allows the parties to save face in that they have not given in. They have only recognized that someone else may have greater expertise to determine a particular point. This, in effect, will have the expert serve as an arbitrator on the particular point.

As an offshoot to this type of resolution, the parties may ask a neutral to make a finding as to the particular element of damages after hearing all of the experts, and they will agree to be bound by this "arbitrated" decision. There is a problem with this type of med-arb in that the mediator should decline if he or she has been told confidential facts that bear upon the particular issue.

If not, and the mediator is going to proceed as an arbitrator for any particular issue

(continued on next page)

Mediation Skills

(continued from previous page)
or even for the entire matter, the neutral must be sure to get a separate agreement where all of the considerations are spelled out in detail, particularly the issue of confidential information that the neutral may have learned. For an examination of same neutral med-arb issues, see Gerald F. Phillips, "The Survey Says: Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, But Party Sophistication Is Mandatory," 26 *Alternatives* 101 (May 2008), and Gerald F. Phillips, "Back to Med-Arb: Survey Indicates Process Concerns Are Decreasing" 26 *Alternatives* 73 (April 2008) (the articles report on a survey of seasoned neutrals' practices and attitudes). See also Gerald F. Phillips, "It's More than Just 'Med-Arb': The Case for 'Transitional Arbitration,'" 23 *Alternatives* 9 (October 2005)(focusing on the ethical issues of same-neutral med-arb). For insight into the use of same-neutral med-arb with a backup neutral for arbitration decisions in a high-profile case, see "The AIG-Greenberg Neutral on his Settlement Role—Mediation? Or Arbitration? Answer: It's Both," 28 *Alternatives* 8 (January 2010).

FORWARD-LOOKING INTERESTS

This principle again borrows *Getting to Yes* concepts. It also has been recognized in virtually every mediation text. It states, basically, that so long as the parties are looking back over their shoulders at what happened in the past and seeking punishment for their adversary or vindication for themselves, they will find it difficult to focus on their real future best interests.

The problem manifests itself with an unrealistic focus upon the parties' internal pre-mediation attorney conferences, where they established outlandish bargaining limitations that can be detrimental to settlement. These pre-mediation plans presume that there will be nothing during the mediation process that will change the party's view of the litigation, the underlying dispute, or the party's future interests.

* * *

In Part II next month, author William Dreier provides more than a dozen more impasse techniques, and advice for helping mediation clients close the deal.

(For bulk reprints of this article, please call (201) 748-8789.)

ADR Briefs

(continued from page 2)
should apply internally to Irish disputes, beyond fulfilling the EC directive mission. Constituents appear to have liked the idea. The new report recommends that the legislative proposal, titled the Mediation and Conciliation Bill, "should apply to disputes arising within Ireland, and . . . is separate from the obligation to implement the 2008 EC Directive. . . ."

The commission raises a question about how the other 25 European Union member states will deal with the EC directive. (One additional EU member, Denmark, has opted out of directive compliance.) An account of legislative progress on the mediation directive was due to be sent late last year to the European Commission, which serves as the EU's executive oversight agency. Implementation is due in May 2011.

"[W]hat will be most interesting is whether member states make the law applicable to domestic mediations as well as cross-border," says Nicola White, who was principal researcher for the Ireland Law Reform Commission report. If steps like those in the report are taken by EU members, she adds, "there will be huge developments in the field of mediation."

Last summer, the EU issued a press release noting that most of the 27 member states already have internal mediation programs. As of August, Estonia, France, Italy and Portugal had installed rules addressing the directive. The release charting each nation's mediation commitment can be found at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1060&type=HTML.

Italy reflects a comprehensive approach. In addition to addressing its mediation directive cross-border compliance, earlier this year the nation overhauled its court system's mediation capabilities with legislation that strongly supports increased ADR use. See Giuseppe De Palo and Leonardo D'Urso, "Explosion or Bust? Italy's New Mediation Model Targets Backlogs to 'Eliminate' One Million Disputes, Annually," 28 *Alternatives* 93 (2010).

White adds that "it will be interesting to see how [EU member states] go about principles such as confidentiality, enforceability and so on. Many may just take the exact wording of the directive; others, like Ireland, may use the directive as the floor and not the ceiling in terms of drafting."

The Law Reform Commission final product follows the EC directive's goal of increasing ADR use to boost access to justice. The directive required countries to implement their cross-border ADR procedures this year.

Irish ADR supporters hope that the law will pass in 2011's first half in time to address the EC directive requirements. Nicola White writes in an E-mail to *Alternatives* that the report and bill "have received widespread interest and support." See, e.g., Fergus Armstrong, "Law Reform Commission marks seismic shift on resolution," *Irish Times* (Nov. 29) (available at www.irishtimes.com/newspaper/ireland/2010/1129/1224284363285.html).

Even in the face of this month's general election and the slashed programs in December's national budget sparked by Ireland's debt crisis, White notes that "it is strongly anticipated that the bill will become an act, perhaps slightly amended from the current version once it's debated in our Parliament, sometime in spring 2011."

She adds, "Nothing is guaranteed but I would be hugely surprised if that's not the case," citing the EC's May 2011 deadline.

The report sets out a broad examination of the definitions of mediation and ADR. It explores the nature of mediation, including an examination of the process's characteristic voluntary participation.