Mediation Skills/*Part 2 of 2*

Venting, Probability Analysis and Examining the Black Box: More Tips for Breaking Down Impasse and Settling the Case

BY WILLIAM A. DREIER

Last month, the author provided the theoretical basis and practical setting for addressing impasse in mediation. That set the stage for five structural blocks, and what can be done to break them down and get a deal cemented. This month, William Dreier concludes with more than a dozen impasse-resolving techniques.

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LET THE PARTIES VENT

If a mediator has not allowed the parties to vent to forestall an undue focus on the past, then, even at a late stage, it may become imperative for the mediator to do so.

Each party wants a neutral, whether a judge, arbitrator or mediator, to hear a history of the perceived wrongdoing, the pain endured, and the lasting effect that the event and dispute has had. Experience shows that it is only after such a catharsis that a good mediator can focus the parties on what the future may hold and how a settlement may affect the economics, efficiencies, and general viability of future plans.

When the mediation is in a case in which the parties will continue to work together, this element may be the most vital in the entire matter, as the parties can then refocus from a discussion of past disagreements to looking ahead to future profits.

In these situations, they often will look to the neutral expert, such as an accountant or appraiser to do the arithmetic once they establish a settlement framework. Often a focus on the real interests of the parties' responsibilities in a continuing business venture is what is needed. In a monetary settlement, structuring a long-term payout often can ease both parties' minds.

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FEARS OF PRECEDENT

Precedent can mean company practices, or the making of new law. An impediment to settlement is a party's fear that paying a sum of money, rehiring an employee, cutting an outstanding bill or waiving certain charges, will be publicized and claims will then abound.

There is legitimacy to these concerns. A utility plagued with questionable slip-and-fall suits may want to build a reputation that it will fight each matter through to a verdict, and that it will not be an easy mark for what it believes are unfounded claims. An insurance carrier may find it makes economic sense to make only low-ball offers during mediations and force every case to the courthouse steps before offering reasonable money, especially where the carriers employ or retain low-priced lawyers and focus on wearing down plaintiffs' counsel. Other carriers, however, can be reasonable in putting fair numbers on the file up front and settling matters before or during mediation.

There is another type of fear of precedent. A defendant or insurance carrier may have received one or more favorable rulings which are questionable and they do not want challenged. This fear of precedent actually favors settlement. The last thing such a party wants is to allow another case to go to trial so that a contrary ruling may reach the law reports. If faced with a well-prepared case, these defendants may be willing to offer more than what ordinarily would be a fair settlement value.

This factor is not limited to defendants' positions. Plaintiffs in various industries look for cases that, depending on the situation, may damage a published decision favoring a plaintiff, or they may be trying to establish contrary precedent to unfavorable cases.

Where the party anticipates that this case may be one to overturn bad law, settlement prospects will dim. A mediator should be aware of these problems and try to work toward a settlement, urging the parties to wait for some other matter to create publicity and influence the state of the law.

ABANDONMENT OF PRINCIPLES

One of the harder barriers to overcome is the plaintiff or defendant who fully realizes the uneconomic position he or she has taken, but rejects an economically fair settlement in order to proceed "on principle."

While this motivation may be present early in the case, it tends to fade somewhat as the case progresses and expenses mount. Often what is needed is an appeal to the party to make a sound business judgment, rather than an emotional decision. In these cases, the party often is seeking or withholding something more than dollars, and a factor often is the offer by the adversary of an apology or other acknowledgement of wrongdoing.

The mediator should recognize that a party may be seeking vindication for a variety of reasons, including making an industry safer, establishing the basis to close a gap in a resume, a need to escape blame or public approbation or other non-economic factor. (See the discussion immediately below of outside-the-box elements in a settlement.)

It is for this reason that confidentiality clauses, non-disparagement agreements or individually tailored representations or protections often are a part of a settlement agreement. The negotiation for remedies for violation can replace the original hesitancy to settle. The

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agreement often includes injunctive relief and reasonable fixed-dollar liquidated damages.

Parties do not like to see a "bad guy" winning, and they have lived through the case far longer than the mediator. Once this factor is recognized, the mediator can aid them by supporting protections and representations that minimize this factor.

There is big caveat to this discussion about principles and parties: There are cases that should not be settled because one side is so wrong that it is patently unfair that the other should give an inch. The oppressive suit, the bad-faith defense, the illegal corporate raid, the undue-influence transfer or will, the predatory attorney, etc., all present situations where the mediator might step gingerly before fostering an unjust settlement. The problem is sometimes the side clearly in the right seeks the settlement because of economic necessity, and too often, is represented by a substandard attorney, who is all that the party can afford.

The only solution in such a case is for the mediator to be guided by conscience and ethics. The mediator should try to help so that justice can be done. Perhaps an adjudicative answer is best, with a thorough review of the facts and law, with the hope that there will be an early trial before a knowledgeable judge.

OUTSIDE-THE-BOX FACTORS

Often an impasse in monetary negotiations can be broken by advancing a nonmonetary factor or even a monetary factor unrelated to the particular dispute. In a personal injury case, for example, the agreement that a defendant must take a defensive driving course or that a product improvement will be initiated might be enough to induce a plaintiff to accept slightly less in cash.

In commercial settings, a guarantee of future orders, favored pricing or something similar can restart active negotiations. In employment cases, a rehiring or at least an advancement of the termination date, which can affect health insurance and employability if another job is sought, can make a difference.

The agreement can include a charitable contribution by one or more parties in lieu of a payment to the adverse party. When the antagonists are people of means, they often will vie to have their opponent pay to match a contribution or will "give up" what they consider their due so that the charity will be supported. Remember the tax benefits here also.

In the context of outside-the-box benefits, the parties first must be focused upon their future interests and the settlement's global nature.

There are times, however, where the representative attending the mediation is so attuned to his or her parochial interests that the total benefit to the party is considered irrelevant. In one case, a surety's claims representative refused to increase a settlement offer even though the plaintiff, a large contractor, agreed he would use the surety—with whom business had been discontinued—for the next several substantial bids he was to submit. The premiums would have greatly exceeded the additional amount sought in the mediation, but the claims representative stated that he did not care if the underwriting department, and thus the surety as a whole, made 10 times the amount that the contractor wanted him to offer. The claims rep was being judged on how his department performed.

Unfortunately, the company president was not in the loop during these negotiations. Sometimes even a simple factor such as increasing warranty services or a price adjustment in a future matter can be enough to move the case away from an impasse.

At Impasse

The assistance: A total of 17 techniques to help produce a lasting mediation agreement.

Your assignment: Readers need to decide when to deploy. And how to combine.

Still stuck? See the 'Last-Minute' tips at the end. They may finish the job the bigger picture tactics couldn't quite complete.

PROBABILITY ANALYSIS

This technique often works in personal injury or other cash settlement cases where one party's personal money or business interest is in issue. As noted, the mediator can help the parties find a settlement range. If a plaintiff claims an 80% to 90% chance of winning on liability, but the defendant asserts only a 40% to 50% chance for the plaintiff to prevail, the parties in private sessions often can be asked what they think a 100% liability case is worth, and can come reasonably close to the same figure. In other cases, the parties can reasonably assess similar probabilities for the plaintiff prevailing, but may differ greatly on the damage verdicts that would be returned.

Working with these figures, a settlement range can be reached by multiplying the probability of the plaintiff winning times the anticipated award. From this must be deducted the costs of the plaintiff getting to that point, plus factors considered such as winning in the trial court but then having to pay the appeals expenses, and then having the same percentages apply if a retrial is ordered.

On the defense side, the probability times the expected damages, plus the costs of getting to the point of payment, defines the settlement range. These ranges build on probability to estimate the eventual award. The fact that the plaintiff must subtract the transactional costs and the defense adds these costs means that the results present a reasonable range to consider for settlement. The mediator, however, must stress with both sides the inexact nature of assessing probabilities and predicting jury awards.

In dealing with plaintiffs and self-insured defendants, if the process has bogged down to an impasse, the mediator can turn to a gambling analogy, even when the figures diverge considerably. A plaintiff who has been offered $100,000 also has the possibility of a "no-cause" verdict. If the plaintiff computes the case's probable value at $200,000, then a reasonable argument for the settlement can be made to the plaintiff: If the plaintiff had $100,000 in cash and visited a gambling casino, would he or she go to the roulette table and put the entire $100,000 on red or black, hoping to double the money while running the risk of losing it all?

Considering the vagaries of the legal system, this is virtually what he or she would be

doing by rejecting the $100,000 offer and going to trial, especially when the offer is expanded by an annuity computation. The plaintiff is left with a hard decision, as is a self-insured defendant, where, of course, the party is faced with the inverse argument.

An additional argument that can be made to an individual plaintiff who is faced with an insurer on the other side is that this decision is uniquely one for the plaintiff to make. The insurer really does not care so long as it has offered a reasonable amount. With the exception of the transaction costs that the insurer must pay, the settlement and trial result in about the same expenditures by the insurer over time. A runaway jury in one case will cancel the low-ball jury in another, and the average verdicts will equal the average settlements. Plaintiffs must be impressed with the fact that they have but one case and not a group from which they could be assured average settlements over time.

Plaintiffs should be reminded to look at the benefits to them of the defendant's final offer as opposed to the roulette wheel of the court room. Also, in jurisdictions where comparative fault above a certain percentage wipes out the full plaintiff's recovery, they have to realize that the rules may work to their detriment.

Mediators also can point out that a dollar now is worth more than a dollar in the future. There is a time value of money, and a structured settlement gives more than a present payment. But a "win" in the future, which may or may not carry interest, does not pay current bills, and it is likely that the payment will be in cheaper dollars due to inflation.

'BLACK BOX' ANALYSIS

In engineering problems where it is difficult to understand the equipment or processes, it often is possible to solve a problem by skipping the analysis of the inner workings.

In a mediation that has gotten bogged down on the resolution of small issues, the mediator can impress on the parties that their own case analysis does not have to agree with the other side's analysis of the same issues. The two can be diametrically opposed. Yet, if from whatever logic, the same conclusion concerning settlement has been reached, each of the individual problems need not be resolved by the parties.

If the same number of dollars is to be paid, or the same stock is to be repurchased, or an apology issued, the case can be resolved, and the parties can then move on to more profitable activities. The plaintiff might think that he or she has just agreed to an 80% settlement which was reasonable to protect the family. The defendants may think they paid twice what the case was worth and that plaintiff's principal point was frivolous, but that the costs of preparation and tying up its officers in a lengthy trial would be counterproductive. A settlement agreement can still state the agreed-upon price and leave the dissimilar foundations within each parties' "black box" alone.

WHEN YOU ARE NEARLY THERE: THE LAST MINUTE HOLDOUTS

(I) *Split the Difference:* There are five approaches to final impasse-breaking when the parties are close, but both have indicated they have reached their final demands and offers. The first and easiest—and most prosaic—is asking the parties whether they will split the difference. There is no valuation and there is no reasoned approach.

The pure simplicity of this suggestion is that each will give up the same amount irrespective of any earlier merits or whether bargaining may have started or ended. The fact is that most parties when they get close are thinking of precisely the solution but neither is willing to offer it, lest their new position start at halfway between their prior figures without the other party moving. Usually the mediator must offer or suggest this in a private session with each party.

(II) *"There Is a Number"*: The next approach often has been used where the mediator writes down a number, usually on a back page of a notepad early in the proceedings. If the parties are still bracketing this number at the end of their bargaining, the mediator can reveal that he or she has written down a number where the mediator thought this case would settle, but is not showing this number to the parties for fear that it will become a three-party mediation.

Often, if this is referred to from time to time during the mediation, the parties will end up practically begging the mediator to show the number. In many cases where the bargaining is reasonably close at the end, they even may agree to accept the mediator's estimate, sight unseen.

If the parties are not close and the mediator shows the number without an agreement, the three-party process commences with the mediator forced to justify the number. Each of the parties will assert how wrong the mediator was, unless there was an understanding that the mediation was evaluative and the parties from the beginning were looking for the mediator to set a value. This technique will work only if the parties need to move a relatively short distance in order to accommodate the number.

(III) *"If I could get $X . . . ?"*: There are two questions that can be asked of the parties when the gap has gotten relatively small. The first is: "If I can get them up/down to $X, would you make a significant change in your offer/demand?" It can be re-phrased: "If I could get $X, would you take/pay it, if it settled the case?"

The first question is asked when there is a sizable gap between the parties and they insist on the ritual dance of coming up or down only in small increments. Or where they are trying to adjust their differences so that the average eventually will be somewhere near where they think they can accept or pay. This question tries to make them break this lock-step minuet.

The second question is a way to feel out the parties to determine when their ultimate offer or demand may be made without it being revealed to the other side. The benefit of these questions is that they work to probe both sides without revealing the adversary's position.

(IV) *"This far, but no further . . ."*: If the mediator is reasonably successful in moving the settlement along to a range, a party may agree to the range, but mark off an area it will not consider. In one case, the plaintiff had come down to a $1 million demand, and the defendant had moved up to a $500,000 offer. And without abandoning their positions, both indicated that they would be amenable to a number beginning with a "6." But the defendant then wanted it to be clear that it would not consider a demand for more than $675,000, and the plaintiff refused to consider a number under $650,000. Suddenly, the parties were within $25,000 of settlement.

The case settled for $670,000.

(V) *The Mediator Number:* Here, even if the mediator has been in a facilitative position,

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and even if the neutral has shown the parties where he or she thought the case would settle early in the proceedings, the mediator basically switches his or her role and tells the parties that he or she has evaluated the case considering all of the factors each has raised. The mediator gives them the "Mediator Number."

This permits an insurance representative to call the home office and say that after many hours of mediation, the neutral has put a number on the case. This number also will weigh heavily on the plaintiff's consideration. Neither party, however, will be willing to accept the number if the other side is going to reject it, because it will act as a new starting point for that side if negotiations later resume when the case comes up for trial.

When a mediator's number is presented, each side is requested to tell the mediator confidentially whether the number will be accepted. Unless both sides accept, neither will know if the other side has done so, and the pre-existing bargaining position will remain as the final offer and demand.

There are times that even this mediator number will be subject to slight adjustment. The insurer might say, "We will not accept the mediator number of $230,000 but we would offer $225,000—that is, only if we know it will close the case."

The other side can be told that the mediator number has been rejected but that with some slight modification the case still might be settled. No offer is official but the plaintiff might agree to some slight shaving of the demand (or the defendant may slightly increase the offer if it was the plaintiff who came close), even if the mediator number had previously been accepted, as the other side has no knowledge of that action.

ADDITIONAL LAST-MINUTE TECHNIQUES

Separate settlements can be proposed for particular parties in multiparty cases.

This tactic has two benefits: It can simplify the remaining case, and it can cause the remaining party or parties to rethink the costs of continuing. The party must then pay that side's share of expert fees, deposition costs and the like. The remaining party, if a defendant, feels the extra exposure to a runaway jury. Often the settlement with the former party includes an agreement to provide witnesses and even experts. In other cases, however, the one-on-one is just what the remaining party wants, and it becomes even more stubborn.

"Best and Final" offer or demand is a technique that can be tacked on to any of the above tools in order to seal the deal. The mediator explains to the parties that they are close based upon private conversations. Each party is asked to relent to the fullest, and express its Best and Final offer in written form, to be opened privately by the mediator at the same time.

The parties are told that if their offers overlap, the settlement will be at their average. If the offers are still short, the parties will be told that the case has not settled, but if they are within X dollars or Y percent of each other, the parties will be told so they may continue to try to bridge the gap. If they cannot, they are asked to confer again with their clients, and perhaps resume in a day or week.

Another "final" technique is to ask for separation. First, try separating the counsel from the parties. See if the attorneys will meet together with the neutral—or even without the mediator—but without their clients.

The discussions become quite frank when the neutral meets with each attorney alone. It may become clear that the lack of an apology is the real settlement impediment. Or one side wants the return of an item, or permission to keep office furniture.

Unusual circumstances may arise. Counsel may reveal that he or she is willing to shave a fee to settle, but has not wanted to tell the client for fear of losing that part of the fee even if there is no settlement. The neutral may be asked to suggest this or other matters so that they do not come from counsel.

If counsel meets with each other sans the mediator, be sure they have a working relationship, or the case actually may lose ground as positions may harden rather than soften.

A "separation" variation is to take the parties apart from their lawyers. Ask counsel if they would mind having the parties discuss their ultimate positions alone—to go for a walk, sit in another room, or even go out for a snack. It is not unusual for them to come back and say that they have bridged the gap, and are even proud to have done so "without the lawyers." Another good result is if they come back and want to resume negotiations.

An alternative is to bring the decision makers together, with or without their lawyers present, and have the mediator ask them for their help in closing the matter. The neutral can tell the parties that he or she is at a loss as to how to proceed. Then, the mediator can wait—silently—to see if one or both starts giving ideas.

AVOID DISTRUST

There are impasse settlement issues relating to the parties continuing distrust in each other. They may turn to the mediator and ask, "Will you monitor the settlement?" "Will you hold an escrow?" "Will you serve as an arbitrator in case disputes arise under the settlement because we do not trust the other side completely?"

When the case is settled, it usually is dismissed with a stipulation that it can be reopened if the settlement amount is not paid, or it may be dismissed on the basis that any remaining issues will be arbitrated.

Mediators fulfilling this function must obtain an ironclad agreement waiving any conflicts and specifying duties. Presumably, the hourly compensation will be kept at whatever level was specified in the mediation.

These agreements often carry a further term that whoever prevails in subsequent deal-point arbitration is paid all costs and fees, and the losing side pays the neutral's fee. Provisions such as these give comfort to a hesitant party, who then can see that the settlement is not leading to another court proceeding.

If there is an escrow, there must be a formal escrow agreement, including who will be the taxable recipient of any income from the escrowed collateral or disputed property. It must cover who will pay the neutral's fees and the costs of holding the property. As escrows can go on for considerable periods of time, the neutral needs a resignation provision in case he or she wants to get out of the transaction.

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Finally, note that it is best never to terminat the negotiations. Just adjourn them so th the door to settlement is never firmly close by the mediator unless the parties tell you th

they do not wish to discuss settlement with you again.

There are times, however, when agreement is just impossible at the time of the conference and just carrying it a day or so, or even for weeks or months seems fruitless. Even then, urge the parties to maintain the progress they have made by agreeing to a "high-low" stipulation. This will protect both sides from a "low-ball" or "ringing-the-bell" verdict, and may be sold by the mediator on the basis of reducing trial costs and affording mutual protection.

Also, in a multi-issue case, the mediator can go back over the issues discussed and see if some can be considered settled, or even traded, so that only a few remaining matters are left for trial.

Always end by reminding the parties of your continued availability so that if after further reflection, they want to continue or resume discussions, they will have a forum ready for doing so.

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Commentary

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Sadly, commercial mediations are increasingly this way. Let's call it "Mediation in Gray," because gray is the color of death, and this is a death-like process. Lawyers pack up their cases, send them to mediators, show up and passively wait in a little conference room for the mediator to shuttle numbers.

Eventually, this expert stranger, based on limited knowledge, judges that settlement should be at some arbitrary number. Then you either take that number or you don't.

These mediations rarely involve opening joint sessions or other direct communication between the sides. Client representatives hardly need attend. For that matter, neither do the lawyers.

Yes, Gray Mediation turns you into a Gray Lawyer. Your passivity makes you death-like, too, as you cede more and more responsibility to the mediator, not only for the process but also for the result.

At its worst, this excessive delegation may carry ethical implications, for while you have a fiduciary duty of undivided loyalty to your client, the mediator does not. Even if it falls short of full client abandonment, you lose the practical opportunity to earn your client's gratitude, respect, and affection by showing him or her a job well done.

Sure, you'll get a lot of settlements. But you would have gotten those anyway. Big deal.

THE BETTER WAY

There is a better way: "Mediation in Green," not in "Gray."

"Green," not in the sense of being environmentally friendly—though it may be that, too—but rather in the sense of vitality and spirit, mediation that is alive.

Green Mediation similarly will get you plenty of settlements. Critically, though, Green Mediation gives you the chance to get much more—the scarce gratitude, respect and affection of your clients, who so often take you for granted or even resent you.

There's a catch, though. Gratitude, respect and affection don't come out of thin air. You have to earn them. Green Mediation gives you that chance, because in Green Mediation, you are no longer a Gray Lawyer. In Green Mediation, you demonstrate your own vitality and spirit, you come to life, and your client gets to see it. It's a big challenge, with an equally big payoff.

> **ADR, Engaged**
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> **The thesis:** Mediation advocacy often is carried out by rote. Or worse.
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> **The cure:** Active lawyering, which the author calls 'Green Mediation.'
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> **The result:** The better outcome you are supposed to get from ADR.

In Green Mediation, lawyers embrace their client duties and appropriately keep responsibility for outcomes. The Green Lawyer distinguishes between a mediator who facilitates his or her negotiation, and one who negotiates for the client. The mediator's facilitative responsibility is to give all sides a process in which they can do their best work. Then you have to get your job done.

Among other things, the Green Lawyer:

- Submits a solid brief sufficiently in advance for the mediator to digest it.
- Works with the mediator in advance to design a process likely to generate maximum progress, including the possibility of an opening joint session.
- Prepares the client for a process with both collaborative and competitive elements.
- Delivers an opening statement, if appropriate, designed to generate maximum progress, not just hostility.
- Does not expect a whole day of shuttle diplomacy. The Green Lawyer understands that people may need to communicate face-to-face, and is not afraid to do so.
- Discusses choices and outcomes frankly with his or her client, and honors the client's right to decide whether or not to settle.
- Documents the settlement in conjunction with the other lawyers (and with the mediator mediating), not expecting the mediator to have a cookie-cutter form that meets the client's needs.

The Green Mediator is hardly idle in all this. The neutral constantly monitors the process, as an anesthesiologist constantly monitors a patient during surgery. He or she makes appropriate adjustments, so that the lawyers, like surgeons, can continue their work. The Green Mediator is not shy about providing evaluative input, even coming down on somebody like a ton of bricks when necessary.

In a Green Mediation, you can actually earn your client's gratitude, respect and affection for a job well done. You can help your client solve his problem, and he can see you do so.

The Gray Mediation alternative? After you passively rely on the Gray Mediator to do your work for you, the mediator might put an arm around you, turn to your client and praise you for having done "a great job" to bring the case to this point. It's patronizing and phony, but in a Gray Mediation it's the best you can do.

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