Mediation Advocacy: Preparing to Avoid an Impasse

This is the 11th article in this series on mediation advocacy. The 10th article, published November 21, addressed the pre-mediation groundwork needed in preparation for signing a terms sheet or a settlement agreement at the end of the mediation session.

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This is the 11th article in this series on mediation advocacy. The 10th article, published November 21, addressed the pre-mediation groundwork needed in preparation for signing a terms sheet or a settlement agreement at the end of the mediation session. The article continued a scenario in which the parties, Widgetronics and DesignMetrics, entered into a contract containing a dispute resolution clause and became embroiled in a dispute over Widgetronics' alleged wrongful termination of the contract. With the mediation imminent, this article discusses one last area of preparation — how to minimize the risk of an impasse.

At some point in the mediation, one, if not both, parties commonly feel that they've reached an impasse — and yet most cases settle. The savvy advocate anticipates the possibility of an impasse or gridlock, and comes to the mediation prepared with information and strategies to avoid or overcome an impasse.

Causes of Impasse

Various circumstances can create an impasse, and knowing these kinds of circumstances enables counsel to take steps to avoid them, thereby increasing the likelihood of a successful mediation.

• **Impatience with the process.** Progress in mediation takes time. Long waits in between caucuses with the mediator are not uncommon. And news that the other party has not moved as expected might lead to frustration, inflexibility, smaller concessions, or worse, giving up on the process. To avoid these reactions, counsel must educate participants about the mediation process and its pace before the mediation session. While the parties may feel as though the dispute will never be resolved, counsel should stress the value of patience and persistence both before and during the mediation session.

• **Information gap or differing perceptions of the facts.** Each party needs to have sufficient information to make an informed decision about settlement options. If the parties lack information, counsel should raise this issue during the preliminary conference call, if they have not done so before, and the parties, with the mediator, should set a deadline for providing any agreed-on information. During the mediation, if lack of information becomes an obstacle, the parties should consider taking a short break or adjourning for a specified time during which they can obtain the relevant information (from the other party, a third party, an expert, or through a deposition, for example). The parties may even obtain the necessary information by permitting the party representatives to talk directly during the mediation. If different perceptions of the facts are an issue, however, the parties could consider agreeing to have an expert review all the facts and render a non-binding opinion or, if a court case is pending, pursue a specific ruling from the court.

• **Entrenched beliefs regarding the case.** Assuming the parties have not agreed in advance to an evaluative mediation, mediators typically would not opine on the merits of each party's case. To overcome entrenched beliefs, mediators often probe these beliefs to challenge the weaknesses of the party's case, as well as to discuss the strengths of the opposing side's case and the risks attendant to litigating the dispute, including legal costs, impact of the delay in resolving the dispute, extra time required to prepare for litigation-related events, distraction from the business, emotional costs, publicity and, of course, costs of losing the case. Counsel should anticipate this probing and advise their clients to expect it as part of the mediator's role. Counsel and the parties should also be prepared to consider seriously the points the mediator raises and to adjust their risk analysis, case value and counter proposals accordingly.

• **Wrong people at the table.** A clash of personalities or distrust between participants, particularly the decision-makers, or having decision-makers without sufficient authority to settle, can lead to impasse. Counsel and the mediator should uncover these hurdles at the preliminary conference call stage and address them expeditiously, if possible. Counsel should give careful consideration to who attends on behalf of the client in view of who is attending on behalf of the opposing party — ignoring these issues may derail any chance for a successful mediation. If personality or trust issues become apparent for the first time at the mediation session, and the counsel and the participants attending can't address the issues in some way during the mediation, counsel should consider asking the mediator either to request each party appoint a different representative and reconvene when this has occurred or, if the representatives creating the problem are not necessary, to excuse them. If substituting decision-makers is not an option, bringing an additional representative (or more than one) who would not engender similar personality or trust issues and would likely have the respect of your opponent is often an effective solution. If lack of authority becomes an issue at the mediation, the parties should take a break or adjourn until a representative with authority can attend the mediation (preferably in person but at least by phone).

• **Artificial deadlines.** When a party shows up at the mediation table announcing they have to leave by 3:30 in the afternoon, not only does it send the wrong messages, the early exit is likely to impede the negotiations. Counsel and the parties need to respect the process and give it a fair chance. If the mediator does not address the parties' commitment to the scheduled time before the mediation, counsel should. They should agree that they — and their clients — will be available for the entire period for which the mediation is scheduled, even though they ultimately may not need or want all the time. For example, if the parties agree to a one-day mediation session, they should be prepared to convene as long as necessary on that day. Mediation participants (including the mediator) should consider setting aside an extra day, in case the negotiations need more time, to permit the parties to take a fresh look at the issues and options, to obtain necessary information, or to permit decision-makers to meet in a casual setting before continuing negotiations (e.g., over drinks, breakfast).

• **Unsatisfied interests.** While the resolution of disputes often becomes focused on certain core tangible issues (e.g., money, the terms of a prospective agreement), underlying every dispute is a set of interests. They may include concerns about confidentiality, cash flow, reputation, saving face, job security or even an emotional attachment to the dispute itself. When negotiations reach an impasse, refocusing on underlying interests may help parties regain perspective, generate new ideas for addressing those interests, and possibly uncover new interests to address. To prepare for the mediation session, counsel need to investigate, well in advance, their clients' interests and identify creative options that could satisfy those interests. Similarly, counsel should try to learn important interests of the opposing party that may be implicated in the dispute and develop options that could satisfy those interests.

Impasse-breaking Tools

Mediators employ tools and strategies to move negotiations forward. Being familiar with these impasse-breaking techniques will enable counsel to better respond to them when raised by the mediator and even to suggest them when appropriate.

• **Linked moves.** The mediator asks each party to agree to move to a specified point on the condition that the other side also agrees to move. For instance, the mediator might ask, "If I can get Party B to move to $X, will you move to $Y?" If both parties are asked to make a move simultaneously, they may be more willing to make larger jumps, which can reinvigorate the bargaining process.

One variant of this technique is range bargaining, where the mediator proposes that future bargaining occur within a stated range. For instance, if the parties are at $200,000 and $1 million, the mediator might suggest bargaining between the range of $450,000 and $750,000. Another variant is parallel track bargaining, which is used when both sides have indicated that they would be willing to move but not until the other proposes something they consider reasonable. The mediator inquires of each side what it considers reasonable, and then asks what movement that party

would make if the other side were to put an offer on the table at that "reasonable" level. The inquiries continue, with the mediator asking what the next offer would need to be by the other side to get the party to go further, until the range is close and the mediator asks permission to reveal the most recent offers.

• **Change the process.** This technique can include changing the players at the table — the mediator meeting separately or jointly with just the attorneys, or just the decision-makers, or requesting different people to participate, perhaps someone with higher authority. Counsel may also suggest changing the issue being considered (e.g., choose a less controversial issue, or deal with an easier aspect of the problematic issue), changing the venue or taking a break (either a short one or even a break for a few weeks). Participants may need some time to calm down, reassess their objectives and come to terms with the offers on the table.

• **A "special request."** The mediator requests a specific concession or a "final move." The mediator may also request a "next-to-final offer" from each party, after which the mediator would indicate whether the gap between those offers is close enough to warrant continued negotiations, or so far apart that resolution would be difficult unless the parties change their view of their case's value.

• **A "mediator's proposal."** This proposal is based not on the mediator's assessment of the merits of the parties' positions but rather on what the mediator feels the parties would be willing to accept. Generally, the mediator will insist that each party either accept or reject the proposal, without modification. If both parties accept it, then the dispute is resolved; if one party doesn't, the mediator will not disclose whether the other party had accepted the proposal. The mediator may ask the rejecting party to identify what it would be willing to accept, which can sometimes get the negotiations moving forward again.

• **Space and time.** Finally, if nothing works and the mediation adjourns without resolution, counsel can request that the mediator make follow-up calls to sound out the parties and perhaps schedule meetings or conference calls to get some movement, leaving the door to settlement open.

With an understanding of the various causes and the strategies for overcoming an impasse, counsel is better able to prepare and minimize the risk. In our final article in this series, we will address advocacy in the post-mediation stage, as well as proactive steps counsel can take with the client to reduce the recurrence of disputes. •

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