

## Mediation - Anticipate and Avoid Impasse Through Pre-Mediation Planning and Preparation

Impasse is a "deadlock" or "stalemate" where disputants have become firmly locked in their positions and either cannot or will not make another move / offer. The purpose of this piece is to suggest that there are some common causes of impasse that can be anticipated and thus planned for and avoided. The following are some common causes of impasse that are *external* to the negotiations at hand.

**EMOTIONS** are an external contributor or cause of impasse. Some emotions are tactical - meaning feigned and not real. Like the person who comes to the mediation loaded for bear and - before *anything* is said or done - unloads on the mediator in the first meeting. Some emotions are a sincere expression of being overwhelmed. This usually happens during storytelling. Either type of emoting saps that person's energy and ability to think, reason and make decisions. Emotions can get the better of parties and/or their counsel. Human beings simply are not wired to be able to reason, communicate, assimilate new information and make decisions while they are angry, fearful or upset. As such, emotions can slow down or halt the process completely.



**FATIGUE** is a follow on to emotions, and can cause one or both sides to get stuck. It's a scientific fact that fatigued parties take more time to process and assimilate new information and to make decisions when they are tired. Mediation is a physically, emotionally, and mentally demanding and draining exercise. It involves intense focus and participation in a condensed number of hours. Some people have more stamina than others - just a reality factor. If the object of a mediation is to have parties *engage* in the exchange of information and settlement proposals, thought should be given in advance with regard to how to deal with with **Emotions** and / or **Fatigue** for purposes of trying to avoid or minimize impasse caused by these external factors.



**DIFFERENT LEVELS OF RISK TOLERANCE.** It is just a fact that people perceive risk differently, and their perception of risk is one thing that influences the value placed on settlement. Impasse is caused by the parties placing different values on the dispute and thus on settlement. A party's orientation towards risk is something that he / she / it brings to the mediation and is generally not negotiable in terms of one's *level* of risk tolerance. It is also something that is largely influenced by the party's position in the dispute - e.g., is it the seller (plaintiff) or the buyer (defendant). Not surprisingly, sellers place a higher value on that which is being sold than do buyers.



**COMMUNICATION PROBLEMS.** The parties may have different levels of communication ability or they may have different ways of communicating based upon their cultural backgrounds - resulting in miscommunication, non-communication or a break down in communications. For example:



Some are low context - very articulate. Very direct with words. Some are high context - less verbal and perhaps utilizing or expecting some level of ritual.

Some are monochronic - list makers that need to talk about one thing at a time and in some sort of priority; tend to make decisions more quickly. Some are polychronic - need to talk globally and get it all on the table; very uncomfortable with lists or agenda; tend to work through problems and make decisions more slowly.

On top of that, where disputes involve family members, friends, business partners, etc., the parties may bring with them a history of negative behavior habits that inhibit their willingness or ability to communicate or influence the manner in which they communicate (or don't communicate).

**GREAT (UNREASONABLE) EXPECTATIONS.** This is caused by people coming to mediation with unreasonable expectations about what the other side should be prepared to give or give up. A close second is the failure or refusal to recognize reality factors that may exist in the present, irrespective of the merits or demerits of the dispute at hand.



**PROCESS MISTAKES.** The proverbial painting one's self into a corner - e.g., keeping cards too close to the



vest; over-advocating; taking an extreme position and holding on even in the face of new information; failing to recognize and respond to a concession or cooperative move by the other side. This cause of impasse is commonly associated with "anchoring." For example, in advance of mediation, counsel might tell the client that the settlement value of the case is between \$200,000 and \$400,000, but what the clients hears and anchors on is \$400,000. In mediation, when presented with a \$250,000 offer, the client is "insulted" because it is far less than the \$400,000 the client has anchored on.

There is no sure fire way to avoid or navigate around the above causes of impasse, but the following are a few suggestions of strategies to avoid impasse on your side of the negotiation:

- ❖ Prepare your client in advance with regard to the role of the mediation - not someone who will decide the matter at the end of the session
- ❖ Set realistic settlement goals. Have a "public" face and a "private" face in terms of the settlement evaluation you share with your client. Present a negotiated outcome as a valid, legitimate and effective way to resolve the dispute.

- ❖ Prepare your client to dance. Set realistic expectations about how long it might take to negotiate a settlement. Bring something to do or work on. Bring computers and/or reading material. Plan on taking a walk with your client when the mediator isn't with you.
- ❖ The use of charts, spreadsheets, graphs, etc. are visual aids that overcome a lot of causes of impasse. With regard to communication problems, most people can understand, deal with and respond to visual displays. With regard to emotions, charting things out is a break in the intensity of the mediation communications. It slows things down and is a non-confrontational way of talking about the problem. On difficult issues, preparing visual aids in advance can help your client prepare.
- ❖ Brainstorm with the client in advance of the mediation. Anticipate and plan for where you might request or suggest brainstorming with the mediator / with the other attorney / with everyone present in joint session.
- ❖ Break the issues down and organize them into groups of "critical," "difficult" and "easy." Give some thought to starting with one or two issues, rather than trying to tackle the whole.
- ❖ Prepare your client in advance to talk about its "worst case" scenario - generally, the other side's "best case"
- ❖ Prepare your client in advance to talk about the costs and risks associated with the litigation