

IMPASSE AVOIDANCE STRATEGIES IN MEDIATION

A Collection of Practical Tools

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Effective mediation is both a science and an art. In facilitating the negotiation of people in conflict, mediators deal with a highly dynamic and situation-specific confluence of personalities, perceptions and procedure and their effect upon interests, needs, wants and values. Sometimes agreements and resolutions are readily reached. At other times, conflicts become intractable.

Since being initially trained as a commercial and construction mediator in 1984 by the American Arbitration Association, I continue to be intrigued with the challenge to understand why and when a particular strategy, process or approach proves effective in advancing the course of negotiations and avoiding an impasse. Colleagues, mentors and friends have been open and generous with the sharing of lessons learned from past mediations. The objective of this article is to present to you a listing and description of the various tools, approaches and strategies that have been successfully used by mediation colleagues, friends and mentors to keep negotiations continuing until resolutions are reached.¹

Before discussing specific impasse avoidance tools, let me offer the following observations regarding impasse, which I hope will be helpful. Impasses do not inevitably occur in mediated negotiations. What may appear to be an impasse may only be a breakthrough delayed. Some disputes seem almost to require negotiation to reach the brink of impasse before parties are motivated to make compromises and hard decisions. Such cases present what can be characterized as a “false impasse”. Here are some indicators of false impasses:

- Negotiations where the consequences of not reaching resolution are worse, more expensive or more undesirable than options identified during the mediation process;

- Negotiating parties with a high sense or affinity for gamesmanship, tactics or maneuvers;
- Negotiator who seems to want to get that last bite or just a little more or one who is fearful of “leaving something on the table”;
- Institutional or political requirement or expectation that a party must fight a good fight until the last moment;
- Negotiators or advocates who strictly control or limit the flow of communications and the mediator’s access to principals.
- Circumstances where a proposal coming from a neutral mediator may be acceptable where proposals from a party would be regarded with suspicion.

The presence of one or more of these indicators in the negotiations should suggest to the mediator that, with patience and understanding, the apparent impasse can be overcome.

It is important for the mediator to avoid rushing to declare an impasse. Ideally, the mediator should be the last party to abandon hope that a particular dispute can be resolved. Mediators must be patient and persistent, even tenacious, in a commitment to keep an open and receptive view for new options, ideas and variations of negotiation packages. One should also avoid rushing to utilize or implement any of the tools and strategies discussed too soon in the course of mediated negotiations. Most of the strategies discussed can be viewed as end game strategies. If used prematurely, they may prove ineffectual.

Mediators attempt and employ various strategic interventions to try to prevent negotiation impasses from occurring. The following impasse avoidance tools and strategies are most effectively used after the mediator has:

- Established and earned credibility and established trustworthiness;
- Obtained a thorough understanding of the past, present and future potential relationships of the parties;
- Explored the facts and perceptions of facts held by the parties;
- Determined, distinguished and prioritized the real needs of the parties as distinguished from their stated positions;

- Explored unarticulated, unrealized or hidden needs of parties; and
- Created the most positive atmosphere conducive to reaching resolutions.

In this article, impasse avoidance strategies will be discussed under the following groups:

1. Strategies that expand the pie.
2. Using objective and external standards.
3. Assessment strategies.
4. Changing procedural or process patterns.
5. Strategies relating to the physical control of the process or creation of conducive environments for negotiating resolutions.
6. Last resorts.

1. **Strategies that expand the pie.**

Inventing options. This approach is articulated best and simplest by Fisher & Ury in their seminal book on interest based negotiations, Getting to Yes: Negotiating Agreement Without Giving In.² Parties in conflict frequently approach negotiations with expectations of entitlement and fixed ideas of what should be the “right” solution. One very important value which a mediator can provide to parties in conflict is encouragement, openness and a sense of creativity and flexibility in the search for and invention of numerous options for mutual benefit. It may be axiomatic, but the more options that can be identified, the greater the likelihood of reaching a successful resolution. Since resolutions in mediation are not bound by convention, restricted by legal precedents nor by limits upon the type or quantity of relief available through the litigation or arbitration process, mediated negotiations can be tailored to meet and satisfy mutual needs and interests. I call this applying *the mediation advantage*. The more the mediator knows about the needs, business, problems, opportunities, hopes and dreams of the parties involved, the better the mediator can help the parties identify solutions and options tailored to fit their specific needs and interests.

A wonderful example of this strategy comes from a case involving a pizza parlor franchisee who leased newly renovated space from a developer and real estate

broker who was renovating an old commercial structure into a new commercial strip mall. The pizza franchise operator was the first new tenant to open for business. The developer encountered several problems during the renovation. Asbestos was discovered in old insulation material resulting in substantial delays in the completion of the project and tenancy of other spaces. Promised benefits of a fully occupied, newly renovated commercial mall were substantially delayed. The pizza franchisee was unable to successfully operate for many months and stopped paying lease rents alleging breach by the developer-lessor. After much give and take in mediation, the parties were separated by only a few thousand dollars. Unfortunately, the developer-lessor was unwilling to pay a penny more and the franchisee-lessee was unwilling to accept a penny less.

Because the mediator was wide ranging in his efforts to understand the nature of the businesses of both parties, the mediator learned critical information seemingly unrelated to the dispute over the lease and development delays. The mediator learned from the business plan and marketing surveys conducted by the franchisee-lessee that a great proportion of a pizza parlor's business comes from the community within a one or two mile radius of the site. The marketing study also disclosed that the dining out decisions made by families with young children were more often than not determined by the desires of the children. The mediator also learned that a successful marketing strategy involved the use of gift certificates. With birthday parties, video game, drinks and souvenir revenues, the real value of a gift certificate sold was actually a multiple of the face value of the certificate.

As for the developer, the mediator understood that the developer was a real estate broker with numerous real estate agents working the nearby community. As it happened, real estate activity at this time was very active. Listings for family homes in the community sold very quickly. The developer-real estate broker was receptive to the idea of providing gift certificates which agents could give to families with children in the nearby community. From this diverse information, the mediator was able to invent an option that bridged the gap between the parties. The developer was happy and willing to purchase gift certificates for the pizza parlor to be used by his real estate agents as

promotional gifts to clients and families in the neighborhood. The business generated by the gift certificates was worth far more to the pizza parlor operator than the face value and cost to the developer. The promotion also boosted traffic for the new commercial center as well as the broker's real estate office located there. The mediator thus expanded the pie and invented additional creative options. He was able to identify options of unequal value with a low cost to one party but a higher value to the other.

Options of unequal value. Other examples of identifying options of unequal value include working with the time value of money. A party may be willing to pay more money if given time to make payment. A letter of recommendation or apology involves no monetary cost but may be of tremendous value to the recipient. One may be unwilling to pay money to another party but willing to make a donation to a charity acceptable to the other party. The giver receives a tax deduction and the recipient receives the satisfaction of causing a donation to be made to a good cause.

Creative packaging. The pizza parlor case is also an example of the creative packaging strategy. Sometimes the linking of an option or trade off item can lead to agreements. The mediator can ask: "If they were willing to . . . , would you consider . . . ?" Other items of value or trade can be brought into the negotiations. If parties have more than the given dispute, perhaps one dispute can be solved in conjunction with the resolution of other issues that may exist between the parties.

Brainstorming. This classic option generating process calls for everyone to participate in the generation of ideas. It is usually done quickly, the mediator invites ideas in a spontaneous, game-like atmosphere. Everyone contributes ideas, they can be wild and crazy. The mediator records the ideas, often on a chart pad for all to see. No one is to criticize or evaluate ideas until after the brainstorming is done. Only after all ideas are expressed will people then discuss the promise and potential of the ideas identified.

2. Using objective and external standards.

Guidelines and standards. The general strategy here is to identify objective criteria or an external source or reference that all parties are willing to refer to for guidance. A classic example is the "blue book" which provides used car values.

Numerous professional and industrial associations promulgate guidelines or standards of performance. Building Codes, architectural standards and trade associations have industry standards which can provide objective criteria for the evaluation and resolution of disputed issues.

Respected Personages. Sometimes the external standard is provided by a respected personage, a trusted authority, a technical expert, an architect, a community or religious leader, a scientist or scholar.

The panel of experts. A panel of experts can be convened. A brief written digest and/or presentation of key facts and views of the parties is provided. The discussion, evaluation and recommendations of the panel can be videotaped for later viewing and consideration by the decision making parties.

3. Assessment strategies.

The mirror of reality. Perhaps the most frequently utilized impasse avoidance strategy is the *mirror of reality*. This is where the mediator helps parties to assess the relative advantages and disadvantages of options facing them. In meeting with parties, I find it helpful to keep a separate place in my case binder where I record and collect observations concerning the strengths and weaknesses of each party and their circumstances and the motivations which drive a need to resolve. The common elements include:

- Cost of continued conflict measured by lawyers' fees, experts' charges, deposition costs, travel expenses, motions, trial time, appeal risks and the like.
- Delay and loss of productive resources (management and staff time, resources and opportunity costs).
- Opportunity to adopt a creative or tailored resolution option.
- Uncertainty inherent in the arbitration or litigation process, the whims of a jury, a skeptical judge, the wild arbitrator, appellate courts, changes in the law.
- Bad publicity or the risk of damage to reputation.

The most important recommendation to be made in a mediator's assessment to a party is that the mediator should avoid the temptation to emphasize and accentuate only the negatives which might compel or motivate a resolution. The

mediator is better served by an even-handed assessment of both advantages and disadvantages, and incentives and disincentives to a negotiated resolution. This preserves the mediator's neutrality and trustworthiness. Costs can be couched in terms of costs saved. Opportunity costs can be viewed as opportunities to generate business or to pursue other positive ventures. As a mirror of reality, the mediator should help parties review their options and make their own evaluations. If properly done, it remains the decision of the parties to select from among the options identified or to pursue litigation, arbitration, or other options.

Testing the strength of held positions. Party positions can be tested or challenged by timely questions appropriately asked. Some examples include: "If you could accomplish . . . , would you walk away from this opportunity to . . . ?" "How do you think the Supreme Court would rule on the issue of . . . ?" "Might the jury, judge, or appeals court take a different viewpoint on this?" "What happens if we fail to reach an agreement at this juncture?"

The visual chart. Sometimes it is helpful to compare options and packages visually . A decision making matrix can be prepared. The matrix can include the same or similar elements as considered in the mirror of reality discussion above. Whenever options are listed or charted, room should be left for more options yet to be identified. This leaves open the ever present possibility that a different idea or a different combination might be identified with continuing effort and openness.

The secret poll. This approach can be appropriate where there are teams of negotiators, advocates and representatives. The mediator selects a few key questions to ask of all persons involved in the negotiations. The questions may involve anticipated ranges of outcomes or jury verdict, estimates of costs to be incurred, time delay, likelihood of appeals, etc. Let every person have a sheet of paper to use as a secret ballot to express their personal and individual views. Make it a game if possible. You might consider adopting an Olympic scoring system where the extreme high and low scores are eliminated from consideration and the remaining scores or opinions are accepted and charted. The secret poll is particularly useful where you want input from all members of a negotiating team. Sometimes when a negotiating team has a

particularly strong spokesperson, other members are overshadowed and dominated to the point of not contributing their insight and input. The secret poll allows for wide input. With such input, you may find that there is broader consensus on some of the key questions. That recognition may facilitate reaching resolution.

4. Changing procedural or process patterns.

The mediator has a wide range of procedural tools. Often time the mediator is recognized as an authority on appropriate process. Parties are often very willing to defer to the mediator's experience and judgment on suitable process or changes in process which may facilitate the negotiations. When a particular process is unproductive, the first responsive strategy is to change the process. A common example is to change from joint sessions to private caucuses or vice-versa. Where emotions are high or where there is great posturing when parties are meeting together in joint sessions, the mediator can change to a private caucus, shuttle diplomacy format.

The gag rule. In one case, discussions in private sessions proved unproductive because parties had fundamentally divergent interpretations of complex "facts". In joint sessions, advocates for both sides expressed the certainty that their side would prevail in court. Obviously, someone was wrong. The extremely strong and vocal positions taken by the advocates hindered communication and blocked the exploration of options and differences in perceived "facts". The mediator spoke with the groups, advocates and principals, privately. Each group was willing to have their advocate spokesperson refrain from comments in joint sessions on the condition that the other side would gag their spokesperson. Both groups were willing to do so because, after all, it was the other party's advocate who was being unrealistic or unreasonable in their stance. The negotiation could then progress in joint session to sort out different perceptions and identify options.

Sunshining a problem. Sometimes it is helpful to bring tensions out of the shadows and put them squarely in view. Where there exists unproductive conduct, sarcasm or disrespectful conduct, a mediator can indirectly suggest that a possible problem may exist. At times, lawyers take too strong a position in championing their

client's cause. The mediator can suggest how clients sometimes expect too much from their counsel to serve as mighty warriors who take no prisoners no matter what the cost. Often, simple recognition of the conduct as a barrier to negotiations is sufficient to change the conduct. Sometimes, other members in a negotiating team upon recognizing the impact of the undesired conduct will come to the assistance of the mediator to help reign in or control their high intensity colleague.

Changing roles. There are many ways that a mediator can help a party "walk a mile in the other's moccasins". You can have the parties physically change positions with the other party, sitting in the other party's chair for example. Then ask each party to articulate what they believe the needs, interests and viewpoints of the other parties to be. After each side or group has had an opportunity to participate, you can ask "if you were the mediator, what might you suggest".

Changing relationships. In negotiations involving teams, sometimes it can be the composition of the team that may warrant change or supplementation. Key views or interests may not be represented at the negotiations. Vocal opponents who have the opportunity or capacity to "shoot down" a committee recommendation may need to be added to the negotiating committee rather than be left out to continue to criticize the product or efforts of the negotiating team.

Change the mediator. Consider also that perhaps you may not be the right person for the circumstances. Consider whether bringing in a co-mediator or changing mediators might be helpful. Bringing in someone who can talk in language the parties understand or relate to may be desirable.

The pilot project. Settle on a small scale. Consider experimentation or the "pilot project". An option can be attempted, evaluated, adapted then expanded.

Incorporating dispute resolution processes. Where disputes are numerous, minute, detailed or not capable of complete anticipation, the adoption of a dispute resolution process in a settlement option can be helpful. Various models of arbitration procedures can be suggested such as baseball arbitration (arbitrator must pick one or the other side's position without compromise), high-low arbitration (arbitrator must rule within the high and low range agreed to by the parties), mediation with last

offer arbitration. A fast track arbitration process empowering the arbitrator to investigate, evaluate and decide certain issues without hearings may be an acceptable mechanism. Other dispute resolution options such as early neutral evaluations, mini-trials and agreements to mediate future disputes might also be incorporated into a resolution package.

5. Strategies relating to the physical control of the process or creation of conducive environments for negotiating resolutions.

There are many actions mediators take to create an atmosphere or to adapt to an environment suitable for encouraging negotiated resolutions. The physical arrangement of chairs, the use of a circular table, the use of a sitting room rather than a conference room setting are simple examples. Sharing favorite treats, homemade brownies or a fruit basket can be an unexpected but welcome reminder of commonalities, shared joys and experiences.

Physical control. Mediators are sometimes afforded more freedom than others to exercise physical control of the process and participants during the course of a mediation. A mediator might be permitted to place a gentle hand on the shoulder of a party threatening to walk out of the negotiations when no one else would dare try.

Doing the unexpected. One situation was related by Bert Kobayashi, Sr. who was called in by the Governor of the State of Hawaii to help mediate a particularly bitter dock strike negotiation. In the negotiations, tough as nails, fist pounding negotiators for both management and labor met with the mediator for many hours. Late into the evening, the anger, distrust, frustration and clash of egos exploded at the conference table. Amidst yelling and invectives, the chief negotiators for both sides squared off for a no holds barred, bare knuckle brawl. In the flash of the moment, the short, not particularly big mediator leaped onto the conference table between the imminent combatants and said "If you want to fight, you two will have to fight me first". The surprising scene of this one man standing on the negotiation table challenging the two embittered negotiators to fight him first created an abrupt freeze frame in the action. Nervous laughter rippled among the negotiating teams. The negotiators then realized that matters had gone too far. The mediator was able to refocus the efforts of the

negotiators upon reaching a workable settlement. Before long, a settlement was reached and a crippling dock strike averted. The mediator who later became a Justice of the Hawaii Supreme Court shared this story with a group of young mediators as an example of how a mediator can do the unexpected and also be allowed to physically control the negotiation process to keep parties focused on the goals to avoid impasse. We later learned that Justice Kobayashi held black belts in both judo and aikido and was quite capable of defending himself under the circumstances.

Humor. An atmosphere that includes some humor can create a healthy positive atmosphere conducive to healing wounds and reaching resolutions. If used, humor must be natural, comfortable, non-threatening and politically correct. The mediator can readily make fun of himself but never of others. Effective humor may make a point but without potentially offensive barbs of criticism.

The best use of humor arises from the situation and is consistent with the context of the setting. One example from a recent mediation arose when one bargaining team observed that one team was comprised of all males and the other team of all females. One day, a member of the male team brought with him the popular book "Men are from Mars, Women are from Venus". The male team in separate sessions joked about the female team and about how they needed to be sensitive to how their negotiation positions and proposals might be received by the team from Venus. They joked about how their proposals might be too Martian, abrupt and insensitive to the importance of relationships as might be viewed by the female team. In jest, one of the male negotiators suggested that they should consider offering to take everyone, including the mediator, out to lunch if a settlement could be reached. A proposal was communicated with an offer to buy lunch for all if the proposal was accepted by the female team. Not to be outdone, the female team continued the theme and offered to take the male team out to lunch if the male team would accept the latest proposal proffered by the female team. Before long, an agreement was struck, a memorandum of agreement was signed and the female team leader treated everyone to an unexpected and fine lunch.

Another situation involving a humorous resolution involved a dispute between a developer and a general contractor over roofing defects affecting fifteen homes in a new subdivision. The parties approached a mutual friend to mediate a resolution between the developer and contractor who had been long time friends as well as business associates. Knowing that the disputants were friends who on previous occasions golfed together, the mediator suggested that the dispute not be resolved in the friend's law office but rather on the golf course. The parties agreed to play a round of golf and the loser at each hole would be responsible to pay for the necessary repair of one house. After fifteen holes, the matter was resolved. Each ended up undertaking to pay for the repair of approximately half of the homes. The roofs got fixed and the relationship was preserved so they could golf and do business together again in the future.

Puzzles and camels. Sometimes a simple puzzle or story can help to create a desired atmosphere of creativity, flexibility and openness to other solutions. The nine dot puzzle is a popular and frequently used puzzle. Three rows of three dots must be connected by utilizing four connected straight lines drawn without lifting pen from paper. People commonly struggle to solve the puzzle unsuccessfully by constraining their solution attempts within the borders created by the nine dots. Solutions are not possible if people attempt to solve the puzzle by remaining within the constraints or limits of the borders created by the nine dots. However, if one is willing to draw their lines outside of the nine dots, multiple solutions are possible. This simple puzzle creates an ethic applicable to the negotiations that it may be helpful to think "beyond the nine dots" in order to identify a solution that may prove to be mutually agreeable.

At an annual conference of the Society of Professionals in Dispute Resolution (SPIDR), William Ury shared with mediators the following story concerning an eighteenth camel. In this story, a father willed to his three children all of his wealth comprised of camels. The father's will specified that the oldest child would receive half of his camels, the second child one-third and the third child, one-ninth of his wealth of camels. When father passed away, he had seventeen camels. It became apparent that

one-half, one-third and one-ninth did not result in readily divisible numbers when applied to the seventeen camels. The children could not resolve this conflict so they sought the assistance of the village wise person. After earning the parties' trust, obtaining a thorough understanding of the circumstances and relationships, clarifying facts and perceptions, and the needs and positions of the squabbling children, the wise person could not fashion a solution acceptable to the fighting children. The wise person apologized and before leaving gave the children an eighteenth camel. After the wise person left this generous gift, the oldest child took nine, being one-half of the eighteen camels, the second child took six or one-third of the eighteen camels, and the third child took two or one-ninth of the eighteen camels. After taking the nine, the six and the two camels, oddly, the eighteenth camel remained. The children returned the eighteenth camel to the wise person with great thanks. With that story, William Ury wished the mediators at this SPIDR Conference great success in helping future disputants find their eighteenth camel.

6. Last resorts.

Inevitably there are situations where impasses are reached in negotiations. A dispute may not be "ripe" for resolution. Necessary parties may not be at the table. Questions of insurance defense or coverage or indemnification obligations may be unresolved. Parties may need or want to conduct more discovery. More litigation blood may need to be shed before some identified option or variation thereof will become acceptable. Whatever the reason for the impasse, the mediator can maintain optimism and hope that the matter can still be resolved. Here are some suggestions for handling last resort situations.

The walkaway with an open door. The mediator can thank all parties for their hard work and commitment to participate in mediation. The mediator can then make statements like the following:

"I really believe this case can be settled. Everyone's best interest is that we reach some kind of amicable agreement. We have identified numerous potentially advantageous options. We may be closer than you think. You may be better off resolving this matter on terms that you know and

can live with rather than having the court/arbitrator cram something down your throat. This matter may take a little rethinking. Perhaps a little time would be helpful for all of us. Can I suggest that we leave this matter subject to call? Because circumstances may change, if any of us can think of something else that might help, any party or the mediator can call to discuss the idea or possibility. I'll do whatever I can to help. Let's leave the door open. Is that all right?"

The mediator should always try to leave the door open to future resolution.

The disappointed cheerleader. Sometimes people need to see a signal to the end of the negotiations. The mediator who has been a fountain of optimism during the mediation closes his notebook, puts away the pen and starts to put things away. The mediator's demeanor changes from one of optimism to downhearted disappointment. The mediator can then thank everyone for their efforts and say something like "We really tried hard on this. I know you all want to find a solution, but . . . Does anyone have a suggestion or is there anything any of you would like to discuss in caucus for a quick moment?" The mediator can then stop and be silent. Let the parties break the silence. The tension of the silence may prompt a return signal from someone of desired continued negotiations.

Confidential mediator evaluations. Mediation meetings may be stopped for an agreed period of time. The mediator can offer to provide a confidential written recommendation separately to each group with suggestions for adjustment of options, interim information gathering or steps that can be taken, etc. In this way, the mediator can continue to be available to facilitate future negotiations between the parties.

Private caucus warning. Where the mediator believes that a party has an unrealistic view of his or her case, that evaluation can be explored in private session as follows:

"Having arbitrated a number of these cases, I think an arbitrator/judge/jury might have some trouble with these aspects of your case Here's why. . . I know it is ultimately your decision and that you will live with the outcome, good or bad. But tell me would you like for me to pursue the possibility of ?"

There are, of course, dangers with this private caucus evaluation. Once the mediator provides an evaluation, the mediator risks loss of hard earned trust and neutrality. Often, mediators do not know all of the facts. Nor can the mediator anticipate all circumstances that may in the future affect a given dispute or case. Thus the parties upon receipt of the mediator's evaluation, can reject it because of the mediator's lack of total understanding and knowledge.

CONCLUSION

This is but a partial list of innumerable tools and approaches that may be of assistance to help avoid breakdowns in mediation. It is a living list in that it can continually be added to, refined and adjusted. I invite your suggestions and comments for additional effective impasse breaking strategies.³ I hope that you will find this list of impasse avoidance strategies helpful in your challenging negotiation and mediation practice.

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² Fisher, Roger & Ury, William, Getting to Yes, Negotiating Agreement Without Giving In, Houghton Mifflin, 1981.

³ Please feel free to send your thoughts and suggestions to me at Kuniyuki & Chang, 900 Fort St., #310, Honolulu, Hawaii, 96813, e-mail: louchang@hula.net, phone: (808) 524-4111, fax: (808) 521-2389.

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