

When Push Comes to Shove

A Practical Guide to
Mediating Disputes

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Resolving Impasses

Beginning mediators often view an impasse (or even the threat of an impasse) as an alarming situation, one fraught with the potential failure of the mediation process. Conversely, if you talk with seasoned veterans who have been through many battles on the way toward resolution, you get a distinct impression that impasses are what mediation is all about! This is when the parties show their true colors. The parties or their attorneys may dig in to fixed positions or retreat from what appeared to be an emerging common ground. This is when the parties truly need a good mediator. Hence my first word of advice: take a deep breath and let it out slowly—the situation is about to get very interesting!

We can begin with a few assumptions about impasses:

- While the dictionary defines *impasse* as a “deadlock” or “predicament affording no obvious escape,” the word may have different meanings to different parties at different times in the process. To one party, the statement “we are at an impasse” might mean that all hope of resolution is lost, but to another, it might simply be a negotiating ploy to threaten the other side (a way of saying, “Give me what I want, or else!”).

- In a true impasse, the parties are stuck on positions that, as they now stand, cannot be reconciled; the mediator’s strategy will therefore be to help people move away from these positions, either toward one another or toward some alternate path. All of the strategies discussed in this chapter focus on ways to achieve this movement.

- Remember that impasse is one of the two possible outcomes of any mediation, the other being agreement of some kind. Given the stakes of not agreeing (high cost of avoidance, power

plays, and higher authority resolutions), in most mediations it will be well worth the effort to break the deadlock. However, do not be afraid to declare an impasse at the end if all efforts at resolution fail; the parties can then pursue their respective BATNAs.

In planning your strategy, consider the following steps in dealing with any impasse:

1. Ask yourself: Why is the impasse occurring at this particular time? What function does it play for each party?
2. Use one or more of the impasse resolution strategies (described below) in an attempt to create movement and resolve the impasse.
3. If you declare an impasse and end the mediation process, leave the door open for future negotiations and the opportunity to reconvene the parties if circumstances change.

IMPASSE AS "LOGJAM"¹

It might be more productive for you to use a word like "logjam" instead of "impasse" to describe the time when the parties seem to be stuck in positions, unable to move forward. The metaphor of a logjam—timber stuck for a time and not moving in its journey along a river—has hope, in that a logjam is amenable to influence, whether by removing a log, moving one or more logs, or adding more timber or water. Experiment with the images you use for problems like impasses, bearing in mind that some words may actually add to a problem instead of helping solve it.

Impasse Function

The psychology of individual and group dynamics holds that all behavior—even impasse and deadlock behavior—serves a particular function for the individuals and members of the group. When your parties reach an impasse, your question should then be: What function does this impasse play for these parties right now? Why is this party, or the attorney, saying no to the proposal

on the table? Or, Why has this party retreated to his or her earlier position?

On first glance, it may seem to you that the impasse behavior is a negotiating ploy, a tactic to gain advantage. The person prepared to walk out of the talks, or the one who says, "This is our last meeting; we'll see you in court," may simply be attempting to get the other side to back off from demands.

A deeper analysis, however, may reveal that the deadlock behavior (whether a tactic, or truly a deadlock declared by one side) occurs because that party *perceives* that the offer on the table will not meet his or her needs and that the earlier position will. You can ask about this in an individual caucus, or it may be clear from the information you already have. In either case, answer the following questions when an impasse is raised by either party or begins to cross your own mind:

- Why is this occurring right now? Is it a negotiating ploy? Is it for some other advantage? How does this person expect that threatening impasse will achieve the advantage?
- How do the parties perceive the proposal on the table now as a method for meeting their key interests, and how do they perceive their earlier proposal?

Resolution Strategies

When you face an impasse in the proceedings, there are at least five kinds of action that you can take. You can (1) go back to basics, (2) change the negotiation mix, (3) challenge the party or parties, (4) support the party or parties, or (5) change the deal on the table. This section will consider these options in detail.

Go Back to Basics

Your first thought in facing an impasse should be: Have I missed something from my earlier analysis of the dispute? In particular, ask the following:

- *Are there other parties who are sabotaging the mediation?* I once conducted a divorce mediation where the parties would agree to certain items one week and then return the next week to back off

from the agreements. After this happened twice, I discovered that they were each involved in lengthy consultations with their respective mothers, who, not having been a part of the process, were derailing the agreements reached in mediation. The solution turned out to be an invitation for telephone caucuses with both mothers. Perhaps one or more of your parties is engaged in key consultations such as this with family members, spouses, or others who have an interest in the outcome.

- *What interests might we have missed?* Does this party have an interest in keeping the dispute going? Are there satisfactions gained for this party by engaging in verbal combat on a regular basis? Can this be exposed, or can an underlying interest or need be met in some other way?

- *Are there some other facts or parameters of this dispute that we have not yet identified?* I learned during one corporate mediation that one of the parties with whom I had direct caucus meetings during the day was returning to his home in the evenings to drink bourbon and rethink everything. The alcohol-induced rethinking—and telephone consultations with associates—led to the unraveling of many proposals. We learned to steer all of our telephone consultations away from evening hours and to anticipate his second-guessing with new questions of our own *before* he left the daily meetings.

- *Is the party's BATNA truly becoming more attractive than a negotiated agreement, and if so, why?* You may need to help the parties do a new cost-benefit analysis to examine what will happen if they do not reach agreement in mediation.

- *Are any of the standard solutions missing in the deal now on the table?* Apologies? Restitution? Plans for the future? Forgiveness? Think of the situation from the point of view of the party who is retreating or digging in, and ask yourself: Does this person need an apology from anyone? Is there something in the restitution or making up for past wrongs that is incomplete? If we improve the deal somewhat, might the integrative path become more attractive? Does this party believe that the whole thing will unravel again in the future—and is the fear possibly warranted? Or is it possible that everything is in place, but this particular person simply has no concept of how to let go of the dispute, no way to put the matter behind him or her, possibly through forgiving what has occurred?

The first approach must be to remember that the heart of an impasse is the same as the heart of the dispute. We simply reserve the word impasse to talk about deadlocks that occur later in mediation, while we often refer to disputes as the occasions that prompt mediation to begin. If you find yourself stuck or if the parties are digging in, then go back to the Conflict Grid and ask again all of the questions you raised in your first meetings with the parties, to see if something has been missed. It is possible that by addressing the missing factor now, you will be able to help the parties move toward common ground for integrative solutions.

FROM POSITIONS TO NEW SOLUTIONS

The impasse often takes the form of one party or another stating a position from which they will not budge. As the diagram in this box indicates, a back-to-basics approach can include four sets of statements or questions designed to create movement from fixed positions to new solutions via underlying interests. The circled numbers in the diagram correspond to the following paragraphs and indicate the flow of the conversation between the mediator and one of the parties in caucus:

1. The party states a position (P_1), and holds fast to the position, saying the other side will simply have to adjust to it. The mediator's standard sentences here include the following: "Let me see if I heard you correctly. You are saying that . . . [restate the position, whatever rationale the party has given]. Your view is that this will work not only for you but also should be acceptable to the other side."

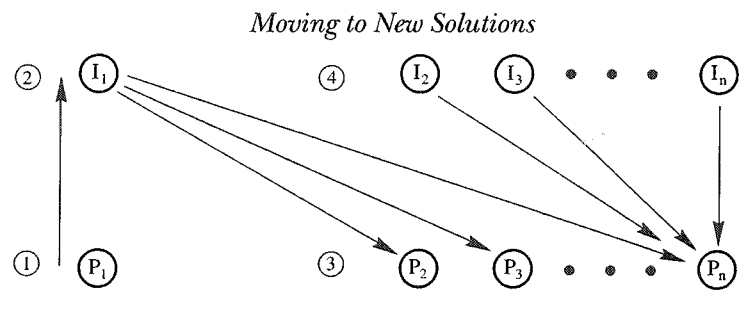
2. The mediator turns the conversation from positions to interests (I_1). "I imagine you could hold the line in that way, and it is possible, of course, that the other side will come around. However, before testing that, let me ask a few questions. What are the interests behind the position you have stated? Put another way, what are you trying to accomplish, or what are you trying to honor, by taking this position?" The objective here, of course, is to transfer talk from the positions back up to matters of the heart. If these basic interests can be described, then it will be possible to move to the third phase of the inquiry.

3. The mediator invites talk about new solutions, or positions (P_2, P_3, \dots, P_n) in order to honor the interests (I_1). "I see your interest now in [saving face, not being made to look like fool, getting into this new market by June 1, or whatever the party has stated], but I wonder, just for discussion's sake, what other steps, besides the one you have mentioned (P_1), you could come up with here that would also help?" Continue probing, brainstorming, pushing for the creation of alternatives [some sensible, others less realistic, all with a goal of getting something on the table].

The path set out in paragraphs 1, 2, and 3 is the mediator's back-to-basics approach for moving from a position through interests and on to new solutions. Another approach is to shift the discussion to competing or equally important interests.

4. "I understand that by taking this position (P_1) you might honor these interests (I_1) and that perhaps there seem to you to be no other good solutions (P_2, P_3, \dots, P_n). I would like to ask, however, does not what you have advocated here (P_1) conflict with other interests you have identified to me that are also important (I_2, I_3, \dots, I_n)?" Examples of competing interests (I_1 versus I_2, \dots, I_n) are saving face but also losing a job (and financial security), and winning out over an ex-spouse in postdivorce litigation but creating so much bad will between parents that children suffer.

In sum, the back-to-basics approach begins with acknowledgment of position(s) taken by one or more parties, but then moves back up the grid to interests, and then to new solutions—or to competing interests as a way of generating new solutions. The intention is to bring some dissonance or instability to the current positional stance, thereby opening the door to new options.



Change the Negotiation Mix

Consider any sampling of the mediation literature or of presentations by mediators at professional meetings or even of war stories at case conferences, and you will pick up a veritable laundry list of strategies that can be used on the spot in any caucus or joint session in order to jolt the parties and help them move away from fixed positions. While the preceding back-to-basics strategies aim at going under and around fixed positions by looking at interests, facts, and other important material, change-the-mix strategies aim at adjusting the mediation process itself. Consider the following methods:

- *Use humor.* The heart of humor during a crisis or conflict is that it changes the perspective of the parties, allows for the physical relief of laughter, and lets people figuratively "get out of character" for a period of time. If humor is your gift, then use it. However, bear in mind that jokes directed at the parties will backfire and that the best humor is that which pokes fun at the mediator or the mediator's plight. (For example, one mediator tossed a Laurel and Hardy line to a co-mediator at a point during a joint meeting when one of their suggestions had fallen flat. To the delight of the parties, he said, "Now, Stanley, here's another fine mess you've gotten me into!")

- *Take a break.* If you're up against a wall and going nowhere, it makes sense to stop the process entirely and suggest that people stretch for a few minutes and come back.

- *Take a walk.* Building on the concept that fixed positions can be literally associated with a place in the room, invite the parties to take a walk and get out of the room for a while. The change of scenery may lead to a change in perspective.

- *Stand up and talk or pace.* This works on the same principle as taking a walk, though it is done in the room. Get out of your own chair, stroll to the window, and look out, or sit in a different part of the room, putting your feet up as you talk, inviting brainstorming, and letting the movement of your body model a loosening up of ideas and perhaps positions.

- *Suggest caucuses with key outside parties.* It may be that caucuses with attorneys for each side, or other key individuals, will lead to information that will shake the negotiation mix in a different direction.

- *Flip a coin.* This variation on the outside-input or outside-standard theme simply involves deferring a decision to the chance outcome that the flip of a coin produces. Typically, this works when there is an interest in saving some of the time and money that might go along with expensive negotiations and when each side can in fact live with the other side's winning the coin flip.

- *Use caucuses to separate the parties.* If the parties are not doing well in joint meetings, move toward separate meetings to see if you can get a different result.

- *Buy time by adjourning the process for a while.* This is a variation on taking a break; consider suspending the negotiations for a period of days.

- *Bring outside standards to the negotiating table.* One of Fisher and Ury's key principles of negotiation involves the use of objective standards to resolve differences and bring parties together. Many alternative dispute resolution techniques are based on the principle of the parties getting input from some outside arbitrator or a retired judge or from a minitrial, where the parties watch their attorneys argue, as a way to add new information to the negotiation. The parties could agree to consult a third person, or any other source (for example, a blue-book to help them decide how to value a car).

- *Defer to higher authority.* Sending one or more issues to an arbitrator or other higher authority may be a way of preserving agreement on all the other issues.

- *Include outside parties such as attorney advocates in the process.* By adding one or more individuals to both sides, you may be able to get the new parties to offer ideas that will sway your intransigent party.

- *Isolate one or more parties for a time.* Just as adding parties to the negotiation process changes the mix, so isolating some parties for a period of time can do the same thing. I once suffered through several caucuses where a particularly intransigent individual monopolized the conversation, putting me in the awkward spot of either living with the disruption or confronting him and alienating him. The solution turned out to be to go for more productive work in private meetings with certain individuals and then caucus with this individual alone to test ideas before bringing them to the larger group caucus.

CONFRONTATION EXAMPLE

I have found that the safest confrontations are those where I can use data that comes from my own experience with the party. I once conducted an organizational mediation where one of the central parties had been accused by his subordinates and associates of lying and other forms of shading the truth. As they told it, he would give one version to them face-to-face and then give an entirely different version to others, often with little similarity between the two. It seemed that he did this more for political expediency (trying to get everyone onboard) than for any self-serving or malicious reasons. In any case, it was hurting his credibility with his colleagues. Halfway through the mediation, I had received permission to share this with the party, and had done so, though neither the party nor I had truly come to grips with the problem. The party had not even admitted wrongdoing, to say nothing of exploring apologies or remedies for change. And then the moment of truth presented itself. The party was telling me his plan for setting up a meeting between himself and another party, one that would include me as mediator in the meeting. He stated, "I will just tell them that this is your idea and that you would like for us to get together to talk."

The only problem with this statement was that it was *not* my idea. I responded: "I can't help but notice that your plan is to frame it to the others to make it look like my idea, when in fact, it is your idea and not mine. Is this what your associates were referring to when they said that you sometimes 'shade the truth?'"

He paused, acted as if he were caught for the moment, and then said, "Yes, you're right. I guess I do that, don't I?"

There may have been other ways and other opportunities to confront him, but there was none better than doing so with data that were immediately available to both of us. These data were far less arguable than other information would have been, and the point was much more easily made.

Challenge the Parties

Mediators in all walks of life use caucuses as times to challenge and confront parties as a means of creating movement. Challenges might take the following form:

- *Costs.* If you see a party ignoring the cost of the proposal he or she is espousing, then say so. Remind the party of the litigation costs in going to court. Remind an intransigent spouse in divorce mediation that the price of winning a particular point may be hurt feelings and anger that interfere with her parenting relationship with her children.

- *Strength of a case.* Some parties have a difficult time evaluating the strength of their cases, and others evaluate their cases in an unrealistic manner. If you sense this is happening, perhaps you can give input on the strength of the case or arrange for advisory arbitration from some mutually agreeable party to evaluate the case.

- *Negotiating style.* More than once I have told individuals in caucus that their negotiating style is interfering with getting a yes from the other side. This challenge to the negotiating style is best coupled with supportive coaching, discussed in the next section.

RESPONDING TO VERBAL ATTACKS

Many a mediator who walks into the middle of a fight with a view to helping the parties resolve a problem runs the risk of being verbally attacked and accused (rightly or wrongly) of misunderstanding the parties, mishandling the process, taking sides, or any of a number of other errors. When this happens, what can you do?

Having watched numerous skilled individuals deal with verbal attacks, here is what I have learned from master mediators:

- Treat all verbal attacks upon you or your work with respect. Painful though it may be, you have an opportunity to correct a wrong and improve the relationship. Instead of immediately defending yourself, treat an attack as a diagnostic opportunity to gain more information.

- Acknowledge the attack and ask questions first. For example, "I'm sorry to hear you feel that way. What happened

here to make you draw that conclusion about me?" Two good things happen when you follow acknowledgment with a question. First, you get yourself off the hot seat. Instead of having to defend your situation (which you probably will not do too well with the limited information you have), you put the question back on the attacker, which puts him or her in the position of explaining the situation. Second, as the party talks, you have an opportunity to hear more information about interests, events, and other material that will be useful to you.

- Use active listening to continue to clarify and refine what the party is saying, again resisting any tendency to defend yourself just yet. (For example, "If I'm hearing you correctly, you have real questions about my approach, particularly since I spent over an hour in caucus with the other person and spent much less time talking with you. Also, you feel that I showed bias in the meeting by asking challenging questions about your numbers and not about the other side's numbers.")

- Once you feel you have a handle on the situation (the reasons for the attack or protest), respond as appropriate. For example:

Acknowledgment and apology. "I see what you mean. I wish I hadn't done it that way, and I hope you will accept my apology. How about if I . . ."

Clarification. "You know, that's not what I intended; what I was trying to do was . . ."

Remember, always, that you are the expert on your intentions (views, feelings, inner thoughts, motives), even though the *behavior* that occurs is open to interpretation by everyone in the room. This means that there can be two or more interpretations of the behavior. Your approach can be to clarify your intentions ("I didn't mean it to happen this way") and still acknowledge that the behavior contradicted your intention ("I can see now how it looked to you").

- Finally, take the lead in proposing that, if possible, you now go forward, learning from the matter while putting it behind you. This may be the sort of modeling of constructive acknowledgment of wrongdoing and problem solving that the parties likely have not been able to do themselves. If you model this as a mediator, you are at least behaving in a manner

congruent with the mediation model, and at best, you may be priming the pump for the parties' own cooperative behavior regarding the substantive issues.

In summary, treat the attack with respect. Acknowledge the attack, ask questions, and use active listening to clarify what you are hearing. Make a distinction between intentions (private, internal data) and behavior (external data that can be interpreted in many ways). Make acknowledgments and apologies as appropriate and then make some proposal or overture for going forward.

Support the Parties

It is useful to remind ourselves that movement from one position to another involves risk. It is not unlike crawling along one branch of a tree and then reaching over to move to another branch. In doing so, you have to leave one spot, grab new branches for support, and live with the fear that the branches may not support you and that you might even have to make a jump or leap, with the hope or plan of catching onto another limb, before you are safe again. All of this usually must be done without a safety net! There are many things you can do to support and encourage parties as they make these seemingly risky and fearful moves. Consider the following:

- *Coach on negotiation strategy and communication skills.* Tell the party having a difficult time getting agreement from the other side that the abrasive and demanding presentation is a part of the problem. You do not need to give an entire course on negotiation and communication skills, though you can use your own expertise in this area to diagnose the problem the party is having. Perhaps the party needs to be coached on how to lead with the presentation of interests (using the "I" statements discussed under self-disclosure communication skills in Resource A) and on how to use active listening to show the other side that his or her interests are being heard.
- *Offer new concepts.* I once debriefed with a party who told me that when the mediator suggested that certain steps would certainly allow her to maintain her dignity while others would not, this

helped her turn a corner in planning her strategy. See if your party needs coaching with a new concept.

- *Validate feelings.* In caucus, you can say to a party, "If I had gone through something like this, then I would be angry too!" The validation of feelings may be the support that the party needs to move from the angry feelings branch to the solutions branch.
- *Interpretation of the other side.* Perhaps you can take a side-by-side approach with one party in caucus and share notes on how you both interpret behavior from the other side. This is a powerful form of support (not bias) and may be just what the party needs in order to process the data and move forward.
- *Pep talk.* Think of all the pep talks given by coaches as they help players move into competition and it becomes clear that disputants often need the same sort of encouragement as they move into new territory. Do not be afraid to offer it.

Change the Deal

The problem may not be with missing basics (for example, interests, key facts, and the like), nor with the negotiation process, nor with the need for confrontation or support of the parties. The impasse may lie in the fact that the integrative proposal—the deal on the table—really is inadequate. This is the time when your own intellectual creativity is called into play, and everything you know about problem solving will be needed. If you are stuck viewing the problem in only one way, you may need to change your own negotiation mix and take a big break from the problem, ask a colleague to consult with you between caucuses, or do whatever else is necessary to find a new way to look at the problem.

See if any of the following might help the parties move out of their deadlocked positions onto a common path:

- *A partial solution to a complex problem.* The most obvious form of this occurs when two parties agree to a solution to one part of the dispute and defer the rest to resolution by higher authorities. It may be that staff of two government agencies can agree to solve one part of the problem that is within their purview, while sending the rest of it up the chain of command or to the courts.
- *Procedural solutions separated from substantive solutions.* Most disputes involving parties that will have a future relationship will

have both substantive and procedural dimensions. The conflict rests not only on what we should do about this particular problem now (substance) but also how we will handle similar problems in the future (procedures). Perhaps the parties can agree on one even if they cannot agree on the other. The other could be postponed for discussion at a later date or sent to higher authorities.

- *Trades.* If the parties have not already proposed this, perhaps you could suggest that each gives the other some or all of what is wanted in exchange for getting something back.

- *Compromises.* Mediators who fashion integrative solutions know that compromises are one of the weaker forms of outcome; nonetheless, they are acceptable. Perhaps each side will say yes to getting a little less of what he or she wants in exchange for getting something instead of nothing.

Declaring Impasse

As was mentioned earlier in this chapter, impasse is one of the two outcomes in any mediation. If the preceding strategies do not lead to movement toward agreement for your parties, then do not be afraid to declare an impasse and end the mediation at that time, leaving the door open for negotiations to begin again at a later date. In declaring an impasse, you can include the following in your final analysis of the situation:

- *A face-saving statement about why the impasse has occurred.* Though you may feel like blaming one side for throwing a monkey wrench into the process, if you wish to leave the door open for future negotiations, it will be better to frame the impasse in such a way that neither side loses face. (For example, "We have gone through a number of mediation sessions together, and at times, the two sides seem to have had a meeting of the minds on possible solutions. Efforts have certainly been devoted toward reaching agreement, but it is clear now that you are at an impasse. You each have different views as to why this is the case, and I do not see any point in reconciling these views at this time. It could be, however, that this will change in the future, at which time we might resume the mediation process.")

- *An explanation of how to initiate mediation again.* Invite them to call you, or suggest that you can, if they agree, mark a date on your calendar to call both sides for follow-up to see whether or not they wish to recon sider mediation.

- *A reminder of confidentiality.* If the parties are on their way toward resolution through the courts, remind them of the confidentiality provisions that protect your notes and testimony.

Summary

The threat of impasse is at the heart of any mediation process, just as the reality of a dispute is at the beginning of any mediation. The same principles used for analyzing disputes and assisting the parties in creating integrative solutions constitute the first step in impasse resolution—go back to the basics. Beyond this, there are numerous strategies that can be used in an attempt to get the parties to reexamine interests and move from fixed positions toward common ground or toward one another. If these steps are successful, then you will be on a path toward testing the emerging agreement (discussed in the next chapter) or declaring an impasse while leaving the door open for renewed negotiations at a later date.

EXERCISES

1. Select one of the role plays in Resource F. Assume that the mediation has progressed through one round of caucuses and shuttle/joint phases and that the parties have now been convened for the closing meeting. Then have one party renege on the deal because some important interest has been neglected or because there has been some change since the previous round of shuttle or joint meetings. The job of the mediator is to resolve the impasse using any of the techniques described in this chapter.

Note to the obstructionist: Write down on a piece of paper the reason you are renegeing on the deal (review this chapter to get ideas on reasons for digging in and forcing an impasse). If the mediator is successful in discovering the reason, you should