

## Impasse-Breaking in Mediation<sup>1</sup>

Impasse is as it sounds: the parties have stopped negotiating, stopped exchanging information, stopped making offers, and stopped listening to one another. Sometimes, impasse-breaking only requires an old-fashioned remedy—more effort. Ideally, we would resolve impasse in negotiations in a mediation session by working harder to address the issues head-on, to satisfy the parties' interests, and to find optimal solutions, *i.e.* a substantive approach to breaking impasse. Other times, the parties may resort to less satisfactory, but sometimes successful, procedural methods of impasse-breaking, such as "splitting the difference" or a "coin toss." Even these may be more desirable than unpredictable outcomes in litigation.

One substantive approach to resolving impasse in mediation is to ask your client, while sitting alone with you and perhaps the mediator in a caucus room, to justify her settlement position to the other side—to *sell her last best offer*. Have the client explain how her last settlement offer satisfies the opponent's interests. If all she can come up with is that the offer is better than nothing or is better than going to court, then more thought and effort is needed. Have her list reasons why the opponent should *want* to accept the offer, not just why the other side should not reject it. Have her describe how the offer satisfies a significant underlying interest of the other side. Then, ask your client to play devil's advocate and list all the reasons why the opponent should reject the offer. This *sell your last best offer* exercise can be very effective in getting the client—and you, the lawyer—to recognize that offers will not often lead to settlement unless interests of both sides of the dispute are met.

Another substantive approach to impasse-breaking is to ask you client to *reverse roles*. Just as it takes two sides to have a dispute, it takes two to resolve it. If you believe the parties are at impasse and that the impasse is the other side's fault, take a moment and put yourself in the other side's shoes. Ask your client to work through the following questions:

1. If you were the other side, what would you need at this point to resolve the dispute?
2. How would giving the other side what you believe it needs affect you?
3. What do you think the other side believes you need to resolve the dispute at this point?
4. How would it impact the other side to give you what you are demanding?

Asking the parties to reverse their roles, to look at the problem or their positions through a third parties' eyes, or to play devil's advocate and list all the reasons why the opponents should reject the proposal can all have the effect of bringing new perspective and new options to the table.

The focus of exercises such as *Sell Your Last Offer* and *Reverse Roles* is to get the parties to go back to exploring all parties' issues, to question whether the current settlement proposals are adequate, and to encourage creating more options. Often, just re-engaging in the process can have the effect of moving the parties beyond impasse.

by O. Russel Murray © 2007

<sup>1</sup> Portions of this paper are derived from O. RUSSEL MURRAY, *The Mediation Handbook: Effective Strategies for Litigators*, Chapter 4, The Problem of Impasse (Bradford Publishing 2006).