Preventing Deadlock, Stalemate and Impasse in Mediation

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In a mediation where the parties have developed a functional working relationship and where potentially acceptable solutions are relatively identifiable, standard mediation techniques are usually effective. In less resolution friendly circumstances however, negotiations may stall, and the mediator[1] must take appropriate steps to prevent deadlock; defined here as a state of inaction resulting from the opposition of equally powerful uncompromising decision-makers. The terms stalemate and impasse, among others, are often used synonymously with deadlock.

The essential question to be addressed in this article is: What steps can the mediator take to exert an appropriate level of process influence and prevent deadlock?[2]

From the mediator's perspective, the usual formula for genuine (as opposed to tactical)[3] deadlock is a gap between the parties' "best" offers which they define as a significant gap, in combination with exhausted, emotionally spent decision-makers who are unwilling or unable to continue efforts to achieve settlement. This is a crisis in the mediation process. The only person who may believe resolution is still possible at this point is most likely the mediator. How did this happen? What is the mediator to do?[4]

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[1] For purposes of this article, the mediator is an independent third-party, who is both neutral and impartial and who has been invited to the dispute to provide extensive procedural assistance.

[2] Assume as a baseline that the mediator has thoroughly prepared for the mediation day and is focused on the case at hand. Further, assume that a pleasing atmosphere has been created in an adequate facility, that the mediator is viewed as credible and that an appropriate approach to the mediation day has emerged through consensus. Finally, assume that the parties have been encouraged to trust the process, and that some rapport has been established. The absence of these and other minimum process competencies would potentially prove problematic in any mediation.

[3] Negotiators sometimes attempt to gain bargaining power over an opponent by threatening impasse. To work, the threat must be perceived as credible and the recipient of the maneuver must view settlement as the preferred method of resolving the case. Credibility usually rests on a one party convincing another of a preference for a method of resolving the case, other than the current proposed settlement. A preference for settlement usually rests on a risk analysis and particular risk tolerances. From the mediator's perspective, this tactic creates more of a temporary state of deadlock, stalemate or impasse.

[4] Some techniques for breaking deadlock, stalemate or impasse are to (1) Reframe the gap in different language; (2) Explore the assumptions underlying the way each party has defined the gap; (3) Retool existing relationships to create value if possible; (4) Break down the gap into smaller issues and attempt to narrow the gap; (5) Take a bird's eye view of what the outline of a global resolution might look like, leaving off the discussion of details for the moment; (6) Orchestrate blind moves; (7) Orchestrate conditional moves; (8) Straw models; (9) Handicapping; (10) Bring attorneys together; (11) Bring decision-makers together; (12) Look for the counterintuitive approach; (13) A settlement with High/Low provision; (14) Split the difference; (15) Adjourn and reconvene at a later date; (16) Partial settlement and consider reconvening non-settling parties at a later date; (17) If asked, and there is no other option, create a mediator's proposal, and (18) Suggest the parties change mediators.

Starting at the beginning, the procedural aspects of the mediation process should first be examined. Empirical and anecdotal evidence tells us that in order to reach agreement, parties engaged in mediation activities progress through various stages. Further, that mediator moves parties through these stages at a quickened pace. Although identified differently by different texts, the stages are generally described as: (1) information gathering; (2) identification of key interests and tensions; (3) generating options for settlement; (4) assessing those options; (5) achieving agreement, and (6) closure. The stages often blend into each other or are revisited during the course of the mediation day.

Next is to gain an appreciation of negotiation styles, negotiation strategies and the theoretical underpinnings of negotiation in the context of mediation. In broadest terms, theory tells us that negotiations can occupy a place either on the continuum between positional[5] and principled[6]; or alternatively on the continuum between distributive[7] and integrative[8] theories. Although often broken down for purposes of analysis; theory, style[9] and strategy[10] are in practice, highly interrelated and dynamic.[11]

Then, mediators must be aware that negotiators often change styles and adopt new strategies during the mediation. The mediator must determine whether negotiators are unaware of

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[5] The parties take up a position and spend the mediation defending it against attack. Underlying interests are not considered. Hard or soft negotiation styles are usually chosen by the parties, ranging from confrontational behavior to yielding behavior - a.k.a. rights based negotiation. The settlement is usually anticipated to be a win-loose result.

[6] Efforts focused on discovering underlying interests and developing viable alternatives to achieve maximum satisfaction for all parties - a.k.a. interest based negotiation. Opportunities for mutual gain are considered. The settlement is usually anticipated to be a win-win result.

[7] Limited resources are available to be distributed between claimants. One party's gain is another's loss. Adversarial or competitive styles are often chosen by parties. Rights or entitlements are usually the focus of discussions. The settlement is usually anticipated to be a win-loose result. "Defining the bargaining zone" is an example of distributive bargaining where the activities in the mediation are viewed as tactical maneuvers designed to identify if such a zone exists and if so, to define and redefine its boundaries. Negotiators need to be convinced that they are not leaving dollars "on the table". This is often described as "Getting to the Ballpark".

[8] Options are explored, some of which may not be an area of disagreement between the parties, thereby creating opportunities for mutual gain. A collaborative or problem solving negotiation style is usually chosen by the parties and creativity in the search for added value is encouraged. The settlement is usually anticipated to be a win-win result.

[9] For example: (1) adversarial; (2) competitive; (3) collaborative, or (4) problem solving.

[10] Defined as a behavior demonstrated in a given circumstance. For example: (1) the start high, stay high approach. Under this approach, a party usually begins with a demand that is somewhat high relative to objective criteria, such as established verdict and appellate awards. That party does not move significantly on the monetary demand until an entire settlement package has been outlined, at which point, the demand drops dramatically; (2) the agreement in principle approach. Under this approach, parties have usually had significant substantive discussions prior to mediation and seek the assistance of the mediator to move the parties towards a more specific one and to bring the final decision-makers into the conversation, and (3) the search for the bargaining zone approach. Under this approach, parties proceed through a series of offers and counteroffers until a settlement range becomes apparent. This is often described as "getting to the ballpark". The activities in the mediation are viewed as tactical maneuvers designed to identify if such a zone exists and if so, to define and redefine its boundaries. Tradeoffs or concessions are usually the method by which this is achieved and the mediator's main tasks are to coax new information from the parties and to tentatively explore boundaries with each party.

[11] Many texts have been written on these subjects and are readily available for further study.

their shifts or if they are intentional and project what impact these shifts will likely have on the process. It may be necessary for the mediator offer process feedback or to begin preconditioning other parties for what they are about to hear. The mediator must also watch for particularly precarious negotiation behaviors,[12] and special situations,[13] which if not addressed, could send the mediation in a slow spiral toward deadlock.

Finally, the mediator must discover what barriers separate the parties conceptually, and then design a specific process to allow the parties to attempt removal of these barriers.[14]

In conclusion, mediators are the experts in process; a process that when properly done, makes the wise resolution self-evident to parties committed to the concept of self-determination. Prevention of deadlock therefore rests in the mediator's development of a knowledge base that is used to recognize recurring patterns in mediation, and further, to use the insight gained from such recognition to make appropriate process decisions.

The fusion of these elements: (1) knowledge; (2) recognition, and (3) decision-making, empowers the mediator to be an extraordinary advocate for resolution and to remain true to the commitment to serve others through the mediation process.

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[12] For example: (1) preconditions to negotiation; (2) extreme demands and offers; (3) changing negotiators in the middle of the mediation; (4) relationship moves; (5) feigned lack of authority; (6) reopening settled issues; (7) the bottom line, and (8) take it or leave it.

[13] For example, sabotage. Occasionally, a particular faction attempting to advance a personal agenda emerges as a saboteur to the negotiations by either polarizing negotiation counterparts or by attempting to undermine internal leadership, or both, the mediator must take steps to gain support for continuing the process from influential people within the room and must attempt to deescalate the conflict created between counterparts. Saboteurs can be parties, corporate or litigation counsel.

[14] For example: (1) the mediator may determine that poor communication is a barrier, either in quantity, quality or form. In this circumstance, the mediator may keep the parties separate and carry messages between groups, thus serving as an adapter; (2) the mediator may determine that lack of information, unverifiable information or lack of agreed upon criteria to evaluate information is a barrier. In this circumstance, the mediator may focus on organizing, categorizing, summarizing, examining the underlying assumptions and articulating the available information. Further, the mediator may assist the parties in developing a schedule for collecting and sharing additional information in the future; (3) the mediator may determine that misperceptions, bias or overwhelming emotion is a barrier. In this circumstance the mediator may allow the party to express their feelings in private session; may attempt to deescalate the behavior; may try to remove or resolve the identified trigger, or may attempt to elegantly reframe the circumstance to bring about a change in the emotion; (4) the mediator may determine that risk evaluations or assessments of what will happen if settlement is not achieved differ so greatly that it is a barrier. In this circumstance, the mediator may guide the conversations toward objective criteria and urge the parties to go through different kinds of analytical exercises.