

Pushing past impasse

Strategies for getting a stalled negotiation back on track

By Jan Frankel Schau

Among the most frustrating experiences in mediation practice today is the early impasse where the parties and counsel are led to conclude that no settlement is possible and the parties are simply outside the bounds of fair evaluation of the liability and damages. In mediation parlance, it's the dreaded early impasse. Yet fewer than five percent of cases filed ever go to trial, so the statistical likelihood is that there is a way out of this logjam, if only you can make a proper diagnosis of what caused the breakdown and what strategies will get you out of the slow lane and back on the highway towards resolution.

Overconfidence

The first impediment to getting to a realistic range of agreement is overconfidence. Daniel Kahneman, economist and Nobel Prize winning author of "Thinking Fast and Slow," wrote: "Courage is willingness to take the risk once you know the odds. Optimistic overconfidence means you are taking the risk because you don't know the odds. It's a big difference."

In some instances, attorneys have not thoroughly researched or considered the odds of winning or losing when they assess a value to their mediated cases. In order to shape and forecast the values, attorneys and their clients may look at jury verdicts and settlements. Unfortunately, because so few cases go

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to trial (as a percentage of those in litigation), only the most sensational results are published or known. This, in effect, skews the odds or obscures them from a realistic analysis altogether. What's worse, by the time of the mediation hearing, attorneys have usually shared their early evaluation with their clients, causing them to have a concrete idea of their potential recovery before they have input from the other side upon which to gauge whether that settlement is attainable.

A sexual-harassment example

Consider the sexual-harassment case, where the only published decisions arise out of claims brought 5 to 10 years before, because so many victims and their alleged perpetrators really want to settle these cases and avoid the publicity that such a scandal can cause. The "values" of these cases are extremely difficult to ascertain. In these cases, one remedy may be to ask your mediator for her evaluation because odds are that she has mediated many more cases with similar fact patterns than you have tried to a verdict.

Another approach may be to query your colleagues as to the settlement values that they have seen on similar facts. The more information you have, the more precisely you can anticipate the odds and help your client (and your adversary!) arrive at the right values for your case. One other approach would be to have a candid conversation with your opposing counsel about the general settlement range, even if it is vague enough to be something like: "This case has a settlement value in the mid-six figures range," or "this is a six-figure case at least and if you are not prepared to offer that, we shouldn't go to mediation at this time." If the response is that the defendant will never pay more than 4 figures ($9,999.99) unless they lose on a motion for summary judgment, all parties may decide that waiting for that judgment is an acceptable risk and avoid the frustration of an early negotiation at mediation.

On the other hand, having this conversation "off the record" may demonstrate that the parties are still open to discussion if both sides are agreeable to re-evaluating at a mediation. Voila, you have broken the threatened impasse before you begin the negotiation by shaking up the overconfidence displayed by both parties in that early exchange.

Psychologists have dubbed overconfidence a "ubiquitous phenomenon." Both Plaintiff and Defense lawyers tend towards unrealistic expectations of their proving liability or prevailing in a motion for summary judgment and the likely award of damages. This can cause a kind of "cognitive blindness" to errors and poor judgment in decision-making. What's worse, if you are genuinely unreasonably confident, you will be statistically less likely to achieve an acceptable compromise at all.

You can combat the overconfidence phenomenon if you seek the input of someone who has more objectivity than you or your client when evaluating the likelihood of success. Ask another attorney, friend, family member or professional neutral to help you to approach the negotiation by looking at the full range of possible outcomes, not just the win/lose of a verdict. You may disagree with that analysis, but at least you can have a realistic dialogue with your client and reasonably manage his expectations. If you end up settling for higher than the predicted outcome, you will have exceeded, not just met their expectations. There is no better way than that to satisfy a client!

Attribution bias

Another common path to impasse is what is known as "attribution bias." When people hear an initial "low ball" offer from their adversary, they naturally tend to ascribe the worst motivations to it. This can cause systematic errors in judgment or evaluation of those initial or early offers. A kind of cognitive blindness can take over and cloud your own judgment about how best to respond.

Psychologists have discovered that generally we attribute our own successes to our innate intelligence, knowledge and skill; whereas we blame our failures on external forces, such as bad luck or sabotage by others. Conversely, we apply the same principles in reverse when we view the action of others. The "other guy" has succeeded because of luck or happenstance, and fails because they are stupid, stubborn or lazy. Attribution bias was first discussed by Psychologist Fritz Heider in his 1958 book, "The Psychology of Interpersonal Relations." Other, more modern psychologists extended the work in the 1960s and '70s, including E.E. Jones and K.E. Davis. In the 1980's, the theory was corroborated by brain imaging techniques which scientifically confirmed that our own biases impact upon our perception of other people's behavior in the workplace and in schools.

The truth is that we are not generally able to make sound judgment about the motives of others, just as we are slightly blind to our own motives and abilities. This is known as "attribution bias" and causes us to make poor decisions, because our judgment of a fair or just result gets clouded by our cognitive biases.

One of the ways to combat the attribution bias is to take the negotiation away from a direct presentation and instead to have bad news or pivotal evidence conveyed by a neutral third party. Typically, the mediator is not viewed with the same hostility or skepticism by opposing counsel as you may be by the time of the mediation hearing. That means she can convey your offers and concessions as well as crucial information in a way that will likely be better received than you can. The attribution bias will not be ascribed to your mediator and will allow the opposing counsel to hear it more openly than if you presented it directly yourself.

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Risk aversion

Most litigants and their lawyers are more afraid of losing than it appears. In a classroom experiment done at Pepperdine University's Law School, the author invited students to exit the class out of Door One for free, but one of the 20 students would be randomly charged $100.00 to exit. The other option was that they could line up and exit Door Two for $5. Although the mathematics is easy and the odds were the same, the risk of losing $100 was much greater and out of their control, than simply accepting the more modest cost of $5 to escape the dull routine of "Mediation 101." All of the students chose to pay their Professor $5 in order to avoid that risk.

When assessing the risk of losing at trial, both financially and psychologically, lawyers on both sides should take care to consider whether you and your client can sustain a loss and the likely effects on both you and your client if that occurs. Will you lose all potential referrals from that client? Will your client turn to you to accuse you of causing the loss when you assured them the odds were in their favor? Have you "oversold" the prospects of winning? Will it affect your stature at the firm or in the community? Will your adversary take advantage of that loss in her future publicity and how will it affect your reputation there? Can your client afford to lose whatever is being offered at the mediation if she loses the trial and a defense verdict is entered? Can she pay her outstanding bills and survive until the date set for trial? What if the case is further delayed by appeals? All of these particulars may factor in to whether the prospect of the deal at hand is fair or unfair, reasonable or unreasonable.

Once the negotiation hits a stall, the informed attorney can assess whether the natural tendency towards risk aversion may be affecting whether they choose to walk out of door one or door two. The odds may be the same, but the strategy in getting there may be very different.

Economists Daniel Kahneman and A. Tversky first wrote of risk aversion in the 1984 article in American Psychologist, "Choices, values and frames." There, they applied economic principles to measure business decision-making. Since then, they have published numerous articles looking at "Prospect Theory" and "The Psychology of Choice," both having a potentially direct impact upon decision-making in the context of settling civil lawsuits.

The endowment effect

The endowment effect is another of Kahneman's hypotheses that holds that people value their own goods more than the same goods owned by others. In studies by economists and decision-maker theorists, it's been shown that if you invite someone to sell their own object, say a coffee mug, they will generally set a price significantly higher than what the prospective buyer is either willing to pay or at a rate higher than what he is able to purchase a similar product for. This phenomenon is also known as "the status quo bias," because people are generally reluctant to enter into trades because they distrust the value placed on the goods or services by "the other." The author, Dan Ariely wrote of this in the Journal of Consumer Research in 2000. He co-authored with Ziv Carmonthe article, "Focusing on the Forgone: How Value Can Appear So Different to Buyers and Sellers." Their article found that participants' hypothetical selling price for NCAA final four tournament tickets was, on average, 14 times higher than the hypothetical buyer was willing to pay.

In order to overcome the status quo bias in mediation, a savvy mediator will gently "re-frame" the potential loss into a potential gain. For example, where Plaintiffs, former employees, are demanding the employer pay $100,000 in overtime wages and penalties to five employees (an apparent "six-figure loss" to the business), if it can be presented as representing $5,000 per year per employee over the four-year relevant statute of limitations, including penalties, the mediator may help the Defense to see the $100,000 payment as a gain, not a loss, since the alleged infractions would invariably cause a bigger penalty than that.

Of course, it helps if you have a diplomatic mediator who can delicately move the negative into the positive column as a "net savings" or gain. A sign displayed at the local gym says: "One reason people resist change is because they focus on what they have to give up instead of what they have to gain." If you can help your client's focus on the gain from resolving their lawsuit, rather than the losses of potential damages or the injury itself, you are more likely to leave them satisfied and avoid the strong resistance to settle or maintain the "status quo."

Approach with integrity

The negotiation can be stalled when, out of either arrogance or ignorance, one side approaches the other with a lack of integrity. For example, if you learn that your client has substantially mitigated his damages by finding better employment after he was terminated, a failure to reveal that may cause major distrust and undermine your ability to fairly negotiate. Yes, the recovery may have been better if your client had not been quite as resilient, but entering into a negotiation based upon false assumptions will undoubtedly be remembered if it is ultimately discovered. Your professional integrity counts.

It is easy to lose sight of the fact that when two competent attorneys agree upon the facts and the law, a formal mediation is usually not required. They can settle those cases fairly without the need for third-party intervention. It is only when the two sides have legitimately different views that negotiation gets challenging. Accordingly, if you want the opposing counsel to approach the negotiation with the requisite respect and open-mindedness, reciprocating that

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approach with some degree of deference towards the possibility that another view may be possible will help to get the negotiation out of the stalled position before the entire negotiation gets derailed. This means an early and sincere acknowledgement that you disagree with their view, but an equally genuine willingness to approach the negotiation with an open mind and re-evaluate if you are persuaded that there is reason to do so based upon information provided at the mediation.

Fairness matters

In social science experiments, even monkeys demonstrate an aversion to social inequity. Where five capuchin monkeys are given an unequal distribution of rewards, the ones given a cucumber, (while others in their presence received sweet grapes), rejected the experimenters and refused to engage in the trading plan, even throwing the cucumbers out at them.

In another experiment conducted with law students, where each was asked to make a deal over $100, being permitted to keep any amount as long as their bargaining partner accepted it, virtually all of the students instinctively offered (and accepted) $40 to $50 because it concerned them that if they offered less than about one-half of what they had, the other side would reject it, even though it was "found money" to which they were not entitled.

Negotiators can seize this instinct by presenting offers grounded in reason and by responding with fair offers and counter-offers, even if they are lower than the ultimate result. Making a move that smacks of inequity may serve to stall, not accelerate negotiation.

As American statesman Dean Acheson, famously said: "Negotiating in the classic diplomatic sense assumes parties are more anxious to agree than to disagree." If we make the assumption that all of the participants in a mediation approach it more anxious to agree than to disagree, getting past these common impediments to settlement should be simpler than we expected.


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