

Play ball! The genesis and evolution of *Baseball Mediation*™

A dispute-resolution process that incorporates an impasse-breaking mechanism directly into the mediation process

By Floyd J. Siegal

Imagine a voluntary/optional mediation process that *always* results in resolution, *always* manages risk effectively and *always* assures a mutually acceptable outcome. Seven years ago, I accidentally stumbled into designing just such a process.

I had received a call from plaintiff's counsel asking me to conduct what he referred to as a "binding mediation." I asked him to explain exactly what he meant because "binding mediation" seemed like an oxymoron to me. He told me the parties wanted me to serve as mediator, but also wanted me to determine the final outcome if settlement negotiations ended in an impasse. I declined because I believed that would turn the mediation process into a de facto arbitration. To me, the guiding principle of mediation is self-determination. The parties decide the outcome, not the mediator. Any process that delegates final decision-making responsibility to the mediator is literally the antithesis of self-determination. He persisted, telling me both sides preferred that I serve as mediator but both sides also insisted on a process that would guarantee resolution and closure. I didn't know it at the time, but I was about to create "*Baseball Mediation*™."

The wheels start to turn . . .

Tasked with designing a process that would guarantee resolution and closure, it suddenly struck me that the only impediment to reaching a resolution in *every* mediation was the absence of a mechanism – agreed to by the parties in advance – for resolving a final impasse.

As a lawyer and former litigator, I'd been trained to accept the notion that jury trials are society's "default" mechanism for resolving disputes if settlement negotiations between the parties are unsuccessful.

But why? Was there a way to fully and finally resolve an impasse between the

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parties *without* resorting to trial? A process that would be both cost-effective and easy to implement? A process that could simultaneously manage risk and assure a mutually acceptable outcome?

To satisfy the parties' objective while remaining true to my own convictions, I knew I would have to design a *different* type of mediation process – one that integrated a fail-safe mechanism for resolving an impasse, while still respecting, to the greatest extent possible, the principle of self-determination. As I pondered how I might accomplish those dual goals, "baseball arbitration" popped into my head unexpectedly.

Baseball arbitration explained

For those who may not be familiar with the term, "baseball arbitration," also referred to as "final offer arbitration," derives its name from its use resolving salary disputes in Major League Baseball between a team and one of its players when: (1) the team wants to retain the player, (2) the team and player are not able to reach an agreement upon the player's salary for the upcoming season; (3) the player doesn't yet qualify for free agency; and (4) the player otherwise meets the eligibility requirements for salary arbitration.

In "baseball arbitration," the team and player submit their respective final proposals to the arbitrator and one another. After considering the evidence and arguments presented by the parties, the arbitrator must select one proposal or the other. In other words, the arbitrator may not issue an award that differs from the proposals submitted by the parties. Consequently, there are only two possible outcomes – both of which have been generated by the parties themselves.

However, the arbitrator is still the one responsible for making the final determination and must ultimately decide which party wins and which party loses by choosing one of the two proposals. That notion was unacceptable to me if I was to serve as mediator.

Another form of "baseball arbitration." often referred to as "night baseball arbitration," differs in the following way: The parties do *not* reveal their proposals to the arbitrator. Instead, the arbitrator considers the evidence and arguments and then issues a merits-based award without knowing which side the award will ultimately favor. In that sense, the arbitrator's award is neutral in its application without being random (as opposed to, for example, flipping a coin, which is also neutral in its application but entirely random). The party whose proposal is closest to the arbitrator's merits-based award is deemed the prevailing party and that party's proposal becomes the actual arbitration award.

Again, there are only two possible outcomes – both generated by the parties.

The brilliance of both "baseball arbitration" and "night baseball arbitration" is threefold:
(1) the parties are incentivized to present their most reasonable proposals because an unreasonable proposal increases the likelihood the arbitrator's decision will favor the other side; (2) the process enables the parties to effectively manage risk because each side knows their precise risk once the proposals are exchanged; and (3) the process often results in a negotiated resolution because the parties usually continue to negotiate after exchanging proposals.

In what I've come to think of as my "Reese's Peanut Butter Cup" moment, I wondered whether I could blend ingredients from "baseball arbitration" and "night baseball arbitration" with ingredients from traditional mediation. I decided to give it a try. And to honor its DNA, I decided to dub the process "Baseball Mediation."

Batter up!

In most respects, *Baseball Mediation* is a conventional mediation process in which the mediator facilitates settlement negotiations following discussions about the facts, liability, damages and risk. As in any mediation, the goal is to reach a negotiated resolution.

If the parties are not able to reach a negotiated resolution, however, *Baseball Mediation* also incorporates a thoughtfully and carefully conceived impasse-breaking mechanism (described in the next section), which is triggered *only* if the parties mutually agree they have reached a final impasse.

Until the parties mutually agree they have reached a *final* impasse, they may elect to resume settlement negotiations at any time by simply "bidding against themselves." In the immortal words of Yogi Berra, *Baseball Mediation* "ain't over 'til it's over."

If the parties mutually agree they have reached a *final* impasse, the impasse-breaking mechanism is triggered, automatically and immediately resolving the dispute for either plaintiff's final demand or defendant's final offer.

By design, *Baseball Mediation,* like its conceptual cousins, "baseball arbitration" and "night baseball arbitration," limits the possible outcomes to those that have been generated by the parties themselves. Consequently, the parties retain total control over both the process *and* the outcome, instead of outsourcing determination of the outcome to a jury or an arbitrator. As a result, *Baseball Mediation* eliminates all risk of an unexpected, unreasonable or unacceptable outcome.

The "impasse-breaking" mechanism

At the outset of the mediation, the mediator engages in private discussions about the case with counsel and the parties. Based upon those discussions, plus review of the mediation briefs and any pre-mediation conferences conducted with counsel, the mediator then takes a few moments to privately and confidentially formulate the following three "projections" and record them on the *Baseball Mediation Worksheet*:

- The minimum amount projected to be within a realistic settlement range ("Projected Minimum");
- The maximum amount projected to be within a realistic settlement range. ("Projected Maximum"); and
- The mathematical midpoint between the two ("Projected Midpoint").

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Another way to think of the Projected Minimum is the *lowest* amount a reasonable plaintiff would feel compelled to seriously consider (or the amount a reasonable defendant would be hard-pressed to reject) if received in the form of a Statutory Offer to Compromise pursuant to CCP section 998 ("998 Offer"). Similarly, another way to think of the Projected Maximum is the *highest* amount a reasonable defendant would feel compelled to seriously consider (or the amount a reasonable plaintiff would be hard-pressed to reject) if received in the form of a 998 Offer.

The mediator's objective is to identify a realistic settlement range and calculate the resulting midpoint, not to substitute his or her subjective value of the claim.

Once completed, the Baseball Mediation Worksheet is emailed to all counsel, "password-protected" so it cannot yet be opened and reviewed. Thereafter, the B*aseball Mediation Worksheet* remains in the inbox of counsel – unable to be opened (or, for that matter, altered) – unless and until the parties agree they have reached a final impasse.

If the parties are unable to reach a negotiated resolution and agree they have reached a final impasse, the password is then shared with counsel so they are able to access and review the *Baseball Mediation Worksheet*, with the understanding and agreement by all parties – pursuant to a stipulation that the parties and counsel must execute in advance – that the dispute will automatically and immediately be resolved for either plaintiff's final settlement demand *or* defendant's final settlement offer, whichever is closer to the Projected Midpoint.

In the unlikely event that plaintiff's final settlement demand and defendant's final settlement offer are equidistant from the Projected Midpoint, the dispute is automatically resolved for the Projected Midpoint.

As mentioned above, the process has been carefully designed to ensure that the *parties* determine the outcome of their own dispute. The parties make their own negotiating decisions based upon their own risk analysis and their own risk tolerance – including whether and when to declare a final impasse.

Given that the parties know the possible outcomes before they declare a final impasse, they will only declare a final impasse if they are willing to accept the risk that the other side's final demand or offer is closer to the Projected Midpoint.

Most importantly, the "impasse-breaking" mechanism preserves self-determination – the central tenet of mediation – because the possible outcomes are generated by the parties themselves and because the impasse-breaking mechanism, just as in "night baseball arbitration," is neutral in application without being random.

By design, therefore, *Baseball Mediation* simultaneously manages risk, preserves self-determination, guarantees closure and ensures a mutually acceptable outcome.

The evolution of *Baseball Mediation*

As originally conceived, the parties were offered the choice of committing to *Baseball Mediation* before meaningful settlement negotiations took place at mediation or forgoing the process entirely. Many parties, especially insurance carriers, balked – pun intended – at the requirement that they commit to the process before settlement negotiations began because they considered the concept untested and too risky.

To address those concerns, *Baseball Mediation* was tweaked. Instead of having to commit to the process before settlement negotiations begin, the parties are now welcome to agree to the process at any time – whether during the mediation itself or at any time subsequent to the mediation in the event the parties were unable to reach a resolution.

In other words, the use of *Baseball Mediation* was expanded to include use as a *post*-mediation tool to reach a resolution – more or less as a substitute for a mediator's proposal.

Today, therefore, the parties are welcome to agree to *Baseball Mediation* at any point during the natural life cycle of a claim – from pre-litigation through appeal.

Impasse reimagined

Perhaps the most noteworthy feature of *Baseball Mediation* is the way in which the concept of *impasse* has been completely reimagined. In *Baseball Mediation*, the term no longer denotes a "deadlock" or "stalemate." Rather than meaning "we can't reach an agreement and we refuse to negotiate any further," *impasse* has been redefined to mean "we've negotiated to our respective final positions but are willing to compromise by accepting either outcome." Rather than a declaration that the parties have not been able to reach a resolution, *impasse* has been repurposed to trigger the mechanism that establishes the final settlement terms. In other words, *impasse* has literally been transformed from "a *roadblock* to resolution" into "the *pathway* to resolution."

Why is *Baseball Mediation* effective?

Baseball Mediation is effective because it requires the parties to view settlement negotiations through an entirely different prism. While the parties' ultimate objective, as in any mediation, is to reach a *negotiated* resolution, *Baseball Mediation* requires the parties to simultaneously focus on ending negotiations closer to the Projected Midpoint in the event negotiations don't result in a settlement. This leads the parties to negotiate more realistically, eliminating unreasonable demands and offers. Put another way, having stipulated they will resolve a final impasse by the agreed-upon protocol, each party is incentivized to present more reasonable demands and offers to the opposing party because an unreasonable

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demand or offer increases the likelihood that the impasse-breaking mechanism will favor the other side.

Baseball Mediation prods the parties to continuously move in the direction of whatever they believe to be the Projected Midpoint. Given that the Projected Midpoint is unknown, it operates as a hidden magnet, drawing the parties toward one another. Consequently, the gap is continually closing, increasing the likelihood the parties will reach a settlement on their own.

Finally, *Baseball Mediation* ensures that the outcome will be acceptable to both sides because neither side will declare a final impasse unless they are prepared to accept the possibility that the opposing party's pending demand or offer is closer to the Projected Midpoint. Any party not willing to accept that risk will continue to negotiate, even if it requires "bidding against oneself."

How effective is *Baseball Mediation*?

Thus far, *Baseball Mediation* – which has been used in five-, six- and seven-figure cases – has been essentially foolproof. In every case in which the parties have stipulated to the process (i.e., *100% of the time)*, the parties have either reached a negotiated resolution or closed the gap to less than $50,000 before triggering the impasse-breaking mechanism by agreeing they had reached a final impasse.

Conclusion

In short, *Baseball Mediation* offers the parties a unique way to simultaneously manage risk, guarantee resolution and ensure a mutually acceptable outcome because the parties themselves determine and control the possible outcomes through their settlement negotiations.

Yogi Berra is reported to have also said "It's tough to make predictions, especially about the future." For anyone who also finds that it's tough to predict the future or anyone who simply prefers certainty and closure to uncertainty and risk, it might be time to play ball!


Siegal

Floyd J. Siegal has been a mediator since 2008 and is celebrating his 10th anniversary with Judicate West. *In 2016, he served as president of the Southern California Mediation Association (SCMA). He is also a Distinguished Fellow in the International Academy of Mediators (IAM), and in 2017 served on its board of governors/executive committee as membership chair. Fun facts: Floyd is an unabashed fan of The West Wing and his son Justin is the drummer in the rock band The Scarlet Opera. Floyd can be reached at fjs@fjsmediation.com.*

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