

ADR Skills

Resurrecting the Stalled Mediation: Don't Let An Ineffective Neutral Wreck Your Settlement

BY MICHAEL D. YOUNG

You've just spent \$3,500 in legal fees preparing for an important mediation: getting the thing scheduled, gathering the critical evidence, undertaking a damages analysis, outlining a negotiation plan, preparing the killer mediation brief, and considering the dispute from every conceivable angle, including your adversary's.

On top of that, you've shelled out \$2,000 for your share of His Honor the Mediator's reasonable fee, arranged your schedule to clear the day, and managed to get your client to take the day off from work. You thought there was an excellent chance your case could settle, which was good because it is important to your client that it does. Everything appeared on track for a successful negotiating event.

Except for one thing: Your mediator is blowing it.



THE STALLED MEDIATION

Well, maybe not blowing it, but your mediator is clearly not being the value-add you expected.

Relaying numbers back and forth, he is acting more as a messenger than the tactical facilitator of the elusive agreement you had hoped. Indeed, but for the minor slobber issue, your dog could probably do as well.

After a few hours, you had moved in small steps from your \$1 million opening demand,

down to \$850,000. The defendant, who had started at "\$350k and that's my best, final, and only offer," had crawled up to \$500,000.

It was slow, not very informative, a little like shopping for a new car—a really expensive one, with nice rims—but at least progress was being made. That is, until the mediator came in and said with a smile and a shrug, "Sorry, looks like we are at impasse."

Huh? Impasse? Your coffee was barely cold, and the plate of cheap cookies was still untouched. Impasse? "I tried my best," said the mediator as he grabbed a cookie, "but it looks like the two of you are just too far apart."

Sorry indeed. Your client will take \$700,000, and you suspect the defendant will pay that much. Impasse? Really?

You look at your client's concerned face. Did you really come this far, invest this much, get this close, only to walk away without a deal? Is there nothing you can do as the client's advocate in mediation to salvage this thing, to recover momentum, to push the process to its natural end? Or when the mediator calls it quits, is that the end? Time to pack up the bags, head for the car, and start crafting your opening statement?

THE RESURRECTION

Rather than pack your bags, this is the time to unpack your superhero cape, if not the whole costume.

It is at the time of the stalled mediation that your client needs you the most. Anyone can get boxed in at a mediation. Your client doesn't need you for that. It's getting out of that box that is the challenge.

If a settlement exists that your client would prefer to the alternative of continued litigation, and that goal is being frustrated by the mediator's ineffectiveness, or even the poor negotiating strategy of your opposing party, do you not owe it to your client to do something about it?

Now is the time to use your negotiating

prowess, your knowledge of the case and the players, your creativity, your investigatory talents, the power of your persuasion, your charm and wit, and whatever other powers you can bring to bear in order to resurrect the stalled mediation and get the negotiations back on track.

What can you do? Plenty.

Remember, this is not the mediator's mediation. It's yours and your client's. This does not mean announcing, Al Haig-style, that you are now in charge and start dictating how this is going to work. But it does mean taking a more direct approach to the negotiation and the exchange of information so critical to the process.

GET INFORMATION

For instance, do you know what is motivating your negotiating counterpoint? Presumably you have a good handle on your own side of the table and you know what your client's true needs are. But have you figured out what is driving things in the other room?

A good mediator is trying to discover this very thing the moment he or she is engaged on a matter. After all, you don't know how to approach or structure a possible resolution if you don't know what is creating the problem in the first place.

Along the same lines, do you know what—or who—is causing the impasse? Even if you have a handle on what's really driving the other room generally, what is impeding progress now? Is it a financial reason ("I have no money and no insurance."), emotional ("I hate that guy and am not paying him a penny."), personnel/authority ("The adjuster with authority is on vacation, again."), business ("My cash flow is seasonal—and this ain't the season."), informational ("They claim they have a witness to the alleged demand by the boss for a foot rub, but we don't know who it is."), or legal ("Their theory of damages is, respectfully, hogwash.")?

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With this information, you can begin to craft a negotiating strategy to sidestep the impasse. But how do you get the information to begin with?

ASK FOR IT

Easy. Ask for it. Start with the mediator. Ask him what the problem is in the other room. What's really holding things up? What are they thinking about? Why are they not moving?

What are they afraid of or concerned about? Who's really driving the boat?

Heck, ask the mediator how high or low he thinks they are willing to go. If he doesn't know, ask him to find out. "It would really help us not only to reevaluate our own views, but to fashion an appropriate response to their last number if we had a better understanding of why our counterparts in the other room are holding fast at \$500,000."

If the mediator is simply going to be a message carrier, then frame the discussions so he or she carries the messages that are useful to the ultimate goal—messages that start to peel back the lawyers' rhetoric and legal arguments, and get at what is really going on. If it seems like you could ask these questions even in a healthy mediation, you are right. It can only help.

Don't think the mediator will share this information with you? You would be surprised. Your counterparts in the next room might be just as frustrated as you are. They might be looking, like you, for a way out of the box they find themselves in. If they are thinking properly about it, they might be happy to share this information with you, just as you might be happy to share similar information with them.

LISTEN FOR IT

But even if the mediator doesn't answer your questions directly, you will be surprised at how much you can learn just by listening to the mediator, both with your ears and eyes. By listening carefully at what is said and not said, and by looking for nonverbal cues and clues, you will be amazed at what you discover about what is going on in the other room that can be

helpful in crafting a successful resolution.

Remember, the mediator only knows what you and your counterpart said about the case, so if the mediator is discussing issues or facts that you didn't share with him, then he or she must have obtained this information from . . . guess who?

You now have a glimpse into the thinking and concerns of your counterpart. Use that glimpse wisely.

DO IT

If this doesn't provide the spark for renewed negotiations, consider having a private discussion with your counterpart.

The Mediator's Value

The ADR query: Is your neutral bringing his or her "A" game?

The problem: This case was going to settle. It is now stuck. Does this neutral know how to get past impasse?

The remedy: A take-charge plan for an advocate that puts the mediator back to work—not for you, but for your client.

No one is stopping you from walking down the hall to the other room, knocking on the door and inviting your opposing counsel to share a fresh cup of coffee and a few stale cookies out in the lobby. (A carefully timed restroom break can accomplish the same result.)

Your goal? At a macro level, to see if you can breathe some life into the negotiations. At a micro level, the goal is to explore what you couldn't get from the mediator—what is causing the impasse?

You can begin by finding some common ground, such as agreeing on how frustrating the mediation is—even a substandard mediation is good for something. From that bonding moment, start using your interpersonal skills, sincerity, and a little charm, to get a conversation started.

Express your desire to find a resolution that both clients can live with, since both clients need to be satisfied before a settlement can be reached. If he or she agrees with that goal—and who wouldn't, really—you are now sitting on the same side of the hypothetical table, together staring across at your common foe, The Dispute.

You can now brainstorm together to resolve your shared problem. You may get some momentum started and your fine mediator can help take it the rest of the way.

Granted, difficult personalities—not yours, of course, but that stubborn pig's in the other room—may sabotage this storybook ending. But don't you at least owe your client the effort?

GET DANGEROUS

Still nothing? Maybe you need to negotiate a little more dangerously.

Think about letting the two principals talk to one another directly, without attorneys. With a good mediator, this is really not dangerous at all. A good mediator knows how to manage and control such a potentially incendiary interaction, and knows when (and when not) to try it. But an unbuffered meeting of principals? Really?

There are circumstances when this is exactly what is needed to get past an impasse. Then again, there are circumstances when this is a recipe for disaster, so you need to tread carefully here. But when it works, it really works.

For instance, a prominent mediator in the Southwest tells a story of how he took two former business partners embroiled in a partnership dissolution to a Buddhist temple and left them there alone for two hours. When the mediator returned, they were sitting side by side on the floor, reminiscing and telling stories. The dispute had been settled an hour earlier.

Do you have clients with a mutual desire to end the dispute? Do they have a foundation of trust to build on? Do they have a successful business history? Did they used to be friends? Are they of approximate equal bargaining power? Are they levelheaded and in control of their emotions? Do you think a failure in honest communication might be part of the problem?

If so, a face to face, without attorneys, may be appropriate. If you do choose to go this route, you will likely want the mediator

to be present to ensure mediation confidentiality. You will want to coach your client beforehand if there are any sensitive topics you don't want raised.

Dangerous? Maybe. Foolhardy? Not in the right circumstances and with the right preparation on both sides.

A Buddhist temple apparently helps, but it is not mandatory.

AN ADVOCATE'S PROPOSAL

Let's say you've done all you can to move things along . . . and the result is you have a brilliant idea for settling the case, one that satisfies both your client's key goals, and appears to address the opposing party's needs. Even the lawyers will like it.

The only problem is, if you propose it the other side will (a) reject it out of hand because you proposed it (they are a skeptical and suspicious lot in the other room); or (b) use it as a ceiling (or floor) and seek to negotiate a better deal based on that.

How do you get this presented?

This one is easy. Discuss it with your mediator so that the mediator adopts it as his or her own proposal, and then suggest he or she float the idea to the other party as a mediator suggestion. Or have the mediator consider presenting the idea to all participants at once, at a joint caucus, so it will be considered by the parties in a more unbiased light.

Can the mediator do this? Well, why not? He or she has adopted your idea; it's now the mediator's to propose as his or her own.

A MEDIATOR'S PROPOSAL?

What happens when your brilliant idea is not so brilliant after all and fails to close the gap?

While your efforts have had some success, you still find yourself \$100,000 apart and out of ideas. And patience. It is late in the evening, the food long gone, the coffee stale, and the central air retired for the evening. You hear the adjuster snoring in the corner. Time, finally, to pack it in?

Not quite yet. While claimed to be overused, underused, and/or misused, depending on who you are asking, there is still available at the bottom of the mediator's Secret Bag O' Tricks the much maligned but often effective Mediator's Proposal.

The mediator provides each side with a proposal for how he or she thinks the dispute should be resolved. This is generally not a resolution that is based on the dispute's "value," nor is it a prediction of what a judge or jury would do with the case. It is not even premised on being "fair."

Rather, the mediator's proposal is a suggested solution that the mediator believes each party will prefer to the alternative of further litigation.

Sometimes the proposal is a settlement number that splits the difference between the parties' last offer and demand; sometimes it is something else altogether.

But the point is that if the neutral has been paying attention to what was going on in each room, he or she should be in a position to fashion a proposal that won't necessarily please, but will seriously tempt each party.

The mediator generally presents it in a double blind "take it or leave it" approach, meaning if a party declines, the mediation is over and the party won't know whether its adversary was or was not willing to accept to deal.

WHEN DO YOU DO IT?

Do you as the advocate have a role to play in the presentation of a mediator's proposal? It's possible.

For instance, if the time seems right for a mediator's proposal, but one is not forthcoming, you could urge your mediator to consider making one.

When is the right time for such a beast? Generally, when all else has failed; when there is no more movement, the parties are at an impasse, the mediator is stymied, the coffee is cold, the cookies are gone, and people are ready to head out the door, grumpy and frustrated. Additionally, the final negotiating positions of the parties cannot be too far apart, in a relative sense.

In other words, the parties must have made substantial progress toward that magical point of overlap so that they can now see each other waving across that final gap between their last positions. They should both want to bridge the gap, but not know how to do it.

Finally, it helps if the negotiations have been reduced to an exchange of numbers—that is, the trading of offers and demands are

no longer tied to "value," or "the facts," or "the law," or "what is fair," but instead are based on a cost benefit or "BATNA" (the best alternative to a negotiated agreement) analysis by each party.

The analysis will be along the lines of whether I would rather take/pay this amount of money and end the thing now, or would I rather spend my money by rolling the dice with additional litigation?

If the parties are still far apart, or in need of information to better evaluate their own or their counterpart's case, or fighting over principle, then maybe a mediator's proposal is not a tool that can help bring closure. Yet.

WAITING FOR THE MAGIC?

So do you simply ask the mediator to provide each party with the proposed resolution, send the neutral out of the room, and then wait for the magic?

You could, and probably most of the time this is the right thing to do. But you are an advocate, remember.

You are trying to get the best deal that you can for your client. Can you, then, either subtly or otherwise, influence the mediator's proposal to better benefit your client's ultimate goals?

Possibly. If there is a range of numbers that will settle the case—for instance something between \$695,000 and \$705,000 in the example discussed at the outset—you (as plaintiff or as plaintiff's advocate) will want the mediator to propose a settlement at the high end of the range. How do you get him there?

You could start by discussing the matter with the mediator. Brainstorm with the mediator and consider the consequences of a proposal at different figures. If there is a legitimate reason your client cannot come down (or go up) to a certain number, make sure the mediator understands this.

How about "gaming" the mediator by suggesting or implying, as you might when negotiating with a counterpart, that your client can never accept less than \$X (when, of course, he would be happy with something less than \$X)? Why not? Why not do all the things you normally would do when trying to influence a negotiation partner—only in this case, your counterpart is the mediator who will be proposing a final settlement?

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Well, because there is a larger than normal risk when you negotiate too sharply with your mediator. What if you are so successful that you convince the mediator to propose \$725,000 as the settlement—and the defendant rejects it as too rich? The defendant would have paid \$700,000, which your client would have gladly accepted, but your power of persuasion so convinced the mediator that the proposal came in too high, and now the deal is lost.

The point is that you need to be careful when trying to “game” the mediator. You don’t want to outsmart yourself and go home without a deal that your client wanted and was well within everyone’s grasp. Remember, it is the person who has been spending time in both rooms—your

erstwhile mediator—who is really in the best position to find that elusive settlement overlap.

Of course, if you do outsmart yourself in this way, have you really lost the deal? After all, the mediator’s proposal is a take-it-or-leave-it proposition, those were the rules, and your opposing party chose to leave it.

Nah. Change the rules. Go back to the mediator and say your client might be willing to accept a little less money if it will get the deal done—essentially asking the mediator to restart the bidding, but this time with the parties much closer together. Why give up when you are this close, and you are still within your client’s authority and desire?


HELP, DON’T HIJACK

The objective here isn’t to encourage the reader, acting as an advocate, to hijack the mediation.

Indeed, if that’s what you got from this article, then this keyboard needs to be retired.

Hijacking the mediation is exactly the opposite of what you should do. Rather, the point is that when you are involved in a mediation that appears to be going south, ask yourself a question: “Is there anything I can do now to change the dynamics of this situation so that a constructive settlement dialogue can be had?”

If you have an effective mediator, be guided by the mediator’s input. If the problem is an ineffectual mediator, however, look to how you can resurrect the process. Mediation is, after all, one of the most powerful processes available for parties to resolve their own disputes in ways that best satisfy their needs.

Don’t you owe it to your client to get the most out of the process possible? 

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