REACHED AN IMPASSE AT A MEDIATION? WAYS TO APPROACH IT

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Walking between mediation conference rooms, I muse that I cannot see how this case is going to settle. The parties have reached an impasse that needs to be resolved before settlement is possible.

Apart from dealing with the legal issues stemming from the facts presented, trust and estate cases are often complicated by the history between the parties and the emotions driving each party's approach to their case—emotions which may be deep-seated and unresolved. For one or more of the parties, the litigation may provide an opportunity to eke out revenge for a long-simmering grievance. And it may be the last time the party will have that opportunity unless the case does not settle; in which case the expense and revenge continue.[01]

With emotions running high, it is not uncommon in trust and estate cases to find the parties entrenched in their positions, intent on getting the result they want. When negotiations begin, neither party is willing to budge. We are at an impasse.

The word "impasse" is defined as a situation from which there is no escape; a deadlock.[02] It appears as a permanent, not a temporary, situation. An impasse may occur in myriad ways and at different times during the course of mediation. It may occur at the beginning of negotiations with one party not willing to put the first demand on the table. It may occur during negotiations with a party declaring that they have reached their limit regarding the amount or result for which they are willing to settle. It may occur at the end of negotiations when finalizing the details necessary to document the settlement agreement.

This article will address various types of impasses and suggest ways to overcome them. While there are many tools that a mediator has to broker a successful settlement, including bracketing, mediator's proposals, and the like, this article focuses on the impasses that occur at the outset of discussions, before getting to those settlement steps.

I. IMPASSE NO. 1: NEITHER PARTY WILLING TO "BLINK" FIRST

Trust and estate litigation is often akin to a staring contest, with neither party wanting to blink first. Sometimes even suggesting that the parties attend mediation can be perceived as an admission of weakness or an indication that one side or the other is not confident in the strength of their case. That may be considered the "first blink." Assuming the parties agree to participate in mediation, however, the next opportunity to blink first may be at the mediation itself.

To get negotiations started, the mediator will typically indicate that it is time to try to resolve the case and suggests that one party make their first "demand." This is often met with resistance because each of the parties fears starting too low or too high, or feels they may gain the upper hand by making the other party make the first demand. Sometimes the resistance stems from a party's concern that they may project a lack of confidence in their case by making the first move. While overcoming these concerns may prove daunting, that should not discourage the mediator or the parties' attorneys from soldiering on, and it is imperative that neither party leave the mediation.[03]

When neither party is willing to make the first move, my practice is to suggest that we make the initial demand either the relief requested in the petitioning party's pleadings or, if settlement discussions have already been had, where the parties left off with their last offer. With this approach, the petitioning party is not giving up any ground. I, as the mediator, already know that the other side is going to scoff at the demand since their client already rejected it, did not counter it, and probably views it with disdain. Nevertheless, it at least gets the conversation started.

II. IMPASSE NO. 2: FEAR OF SETTLING BASED ON INCOMPLETE INFORMATION

Let's assume that the preliminaries of mediation have occurred. Caucuses and the facilitative and evaluative phases of the process are concluded. We are now ready to begin the settlement phase.

We are usually faced with one of two situations. Either there have been settlement discussions and offers/counteroffers have been exchanged, or there have been no settlement discussions and the mediation is the first effort undertaken to settle the case. Trust and estate mediations typically occur early in the case, maybe before any petition or complaint has been filed or, after filing, but before the parties want to incur the expense of discovery and discovery motions. In cases where mediation is the first meaningful attempt at settlement, the lack of discovery and one side or the other "not knowing what they don't know," can be an impediment to resolution of the case, because the party lacking information may be afraid of giving up unknown claims.

In those situations, I find it helpful to provide a realistic estimate of the costs—in terms of both time and money—that will be incurred in order to conduct the discovery necessary to satisfy the unknowing party's concerns, while, at the same time, emphasizing the benefits of the certainty of result and finality realized by settling the case.

III. IMPASSE NO. 3: REJECTING OFFERS JUST BECAUSE THEY COME FROM THE OTHER SIDE

Why is a demand unacceptable? One reason could be the mere fact that the demand or counteroffer came from the other side. For that reason alone, it is suspect. The formal term for this is "reactive devaluation." The family dynamics, animosity, perceptions, or perspectives may be such that the other side's position is instinctively viewed as having no merit and, therefore, no value. Any settlement proposal, no matter how reasonable, is met with suspicion.

I recently mediated a case involving four siblings, one acting as the current successor trustee and another who was the removed trustee. The removed trustee, while she had cost the trust a lot of money related to her removal, failure to cooperate with the sale of trust property, and delay in administration, viewed the successor trustee, her sister, negatively. As such, she was solely focused on trying to figure out how she was being taking advantage of by her sister. While the financial settlement was easy to resolve, the division of personal property became the barrier to settlement.

The removed trustee laid claim to all personal property that came from their mother's house that had been in storage for over two years. The other siblings wanted to divide the property among the siblings equally, but the removed trustee insisted that all of the property belonged to her—not her mother. After a week of intense negotiations, an agreement was finally reached when the removed trustee agreed that she would limit her claim to that property for which she had proof of purchase.

This was a classic example where the siblings devalued the claims made by the others solely because they came from the other side. It is hard to believe that the case almost did not settle because of pots and pans that had been in storage for so long, but that was the case.

One technique that helps to overcome the impulse to devalue offers made by the other side is to tell the offeree party that the offer was my idea and did not come from the other side. And, in many cases, that representation is mostly true.

IV. IMPASSE NO. 4: PARTIES RELYING ON ALTERNATIVE FACTS

Another barrier to settlement may occur when the parties are not working from the same information pool. In that situation, the objectives of the parties may differ based on their respective understandings of the facts and the corresponding assumptions that follow therefrom. A discrepancy of information may lead one side to seek a financial result that is unrealistic, or to have unreasonable expectations, or to push for an outcome that is action-based and not financially driven, thereby causing them to misunderstand or mistrust the other party's objectives or preferences.

The difficulty in settling such a case is when one of the parties refuses to elicit or consider information they do not have or even to entertain the idea that they may be lacking information. A common example of this involves property valuations, where one party insists on using an old appraisal and refuses to consider more current information. This becomes a barrier to settlement, because the parties are not working from a common starting place. It can have a profound impact on reaching possible settlement since one side is undervaluing what is necessary for the other party to accept. The failure to settle in this situation becomes a self-fulfilling prophesy.

There is a way to overcome such a disparity of information. It is incumbent on the mediator to recognize the situation and to move the parties to navigate the information gap, either by agreeing on a common set of facts or devising a plan to derive the necessary information that will enable

the parties to start from the same information. The latter solution may require the parties to return for another mediation session once the information discrepancy has been resolved.

V. IMPASSE NO. 5: WHEN THE ATTORNEY IS THE BARRIER TO SETTLEMENT

Attorneys, themselves, can present a barrier to settlement in myriad ways.

A. The Myopic Attorney

There are attorneys who see themselves as the savior or "knight in shining armor" for the aggrieved party. Counsel has a specific outcome in mind and they will not advise their client to settle for any less. As a mediator, when faced with that situation, it is clear that the professional's judgment is biased in such a way that they do not properly assess the strengths and weaknesses of their case.

When an attorney comes in adamant that their client has been aggrieved, and that the wrong must be remedied, they are already closed to information that might modify their perceptions about their client. They do not contemplate the possibility that their client may have played a significant role in the circumstances leading up to the litigation and may not be as innocent as the attorney thought. This lack of awareness on the part of counsel can pose a huge impasse to settlement of the case. In the meantime, the "victimized" client is happy to have someone fighting for their cause.

This could be viewed as another example of an information gap, but it really is not because, here, it is counsel's myopia regarding their client and case, rather than a true discrepancy of information, that is causing the impasse. A common example involves a client who is elderly and portrays themselves as an innocent victim. The client's appearance alone may lead counsel to assume that the client must be the aggrieved party, thereby closing the attorney's imagination to other possibilities.

As a mediator, I have often found that, after listening to the "victim's" side of the story and sympathizing with them, credible information is presented by the other side establishing that the "victim's" actions may be far from innocent and may even go so far as to constitute elder abuse and/or undue influence.

In this situation, it is necessary to speak with counsel outside the presence of their client to ensure counsel's relationship with their client remains intact. Given that counsel participated in the selection of, and agreed to, the mediator, it may be presumed that counsel values the mediator's opinion. Relying on that relationship with counsel, and the mediator's position as an unbiased neutral, I have found that, when presenting counsel with competent evidence that rebuts what their client has told them, counsel's eyes may be opened to the fact that their client has distorted the information on which they are relying. Often, once the attorney is educated to the "true" facts, the attorney will become the greatest advocate for settlement. Rather than continuing the attack, representation of their client now becomes a matter of damage control, where counsel's job is to minimize the exposure of their client, while finding a way to resolve the situation in a manner that will be accepted by the opposing side.

B. Conflicting Incentives

I have seen valuable estates eviscerated solely by legal disputes that arise during the course of administration and continue through years of litigation.

Another example of the attorney acting as a barrier to settlement occurs when the attorney has no incentive or desire to settle. The attorney has a client paying their fees on a regular basis and to the extent the case remains ongoing there is no financial incentive to resolve the case. In such cases, the attorney does not come to participate in the mediation in good faith, but simply to give the appearance that they were amenable to settlement. Or, perhaps, the attorney may have been required to attend mediation by the court, so the attorney showed up, but not with the intent to meaningfully participate in any settlement efforts.

I recently mediated a case where one party was represented by two unaffiliated attorneys. One attorney represented the party in his capacity as the suspended trustee of a trust. The other attorney represented the party in his capacity as a beneficiary of the trust, together with the other trust beneficiaries. At one point during the mediation, it became clear that counsel for the beneficiaries was not participating in good faith. The attorney was not properly considering offers or even methodologies to settle the case; counsel for the beneficiaries merely said "No" to everything. Meanwhile, counsel for the suspended trustee expressed frustration regarding the reticence of beneficiaries' counsel to discuss ways to settle the case.

In an attempt to resolve this impasse, it became necessary to try to divide and conquer the competing interests. This presents a delicate situation for the mediator, however, because the last thing a mediator wants to do is interfere with the attorney-client relationship, even when the mediator believes counsel is not acting in their client's best interests. Ultimately, counsel for the beneficiaries seemed to carry more influence with this party, and given that counsel's recalcitrance, it was not possible to bridge the differences. While it is costly for the client, unfortunately,

going to trial may be the only way to resolve a legal dispute when counsel refuses to engage in settlement efforts.

VI. IMPASSE NO. 6: STRUCTURAL BARRIERS TO SETTLEMENT

A. Sunk Costs

At times there are barriers impacting resolution based on some external issue or pressure having nothing to do with the actual case. These are known as "structural barriers." Sometimes, a case goes on for so long that the resources no longer have the value they did when the case began, or the attorney fees have grown to such an extent that any settlement amount pales in comparison to what was spent to get to that point. Neither of these circumstances has anything to do with the merits of a case, but they may greatly influence a party's willingness to address that reality and settle the case.

I recently mediated a matter where one of the parties had already spent thousands of dollars in attorney fees only to find that she was not likely to prevail in litigation and the cost of going forward was going to be significant. In economic terms, the attorney fees already incurred represented a "sunk" cost. The money was spent and was unlikely to ever be recovered, either by prevailing in litigation or through a favorable settlement.

That is a hard concept for someone to accept. In such cases, it can be helpful to emphasize the risks and costs, in terms of money, time, and emotional toll, of continuing to litigate. At the end of the day, the party in this case understood the risks involved in not settling the case and agreed to settle for no money and a full Civil Code section 1542 release and waivers from the other parties. At least she put an end to incurring further attorney fees and guaranteed that the opposing side would not sue her for malicious prosecution or any other cause of action.

B. Cultural Factors

While they may have nothing to do with the specific legal issues or questions of fact involved in trust and estate litigation, cultural factors resulting from a party's place of origin must be considered as they may be subliminal influencers affecting whether and how a case is settled. Cultural norms may present unique sensitivities that should not be ignored or dismissed when trying to resolve the case. For example, understanding how an eldest son is regarded in certain cultures may play a role in how a party views the case. A mediator will be better able to help the parties settle their case, if the mediator is sensitive to these cultural differences and has an understanding of how the norms and customs of a particular culture may be influencing one or more of the parties.

VII. IMPASSE NO. 7: HEIGHTENED PSYCHOLOGICAL OR EMOTIONAL SENSITIVITY OF ONE OR BOTH OF THE PARTIES

Interpersonal or psychological issues can also be an impediment to settlement. These may arise, for example, if one party has poor communication skills, is suffering from a personality disorder, has a fear of being taken advantage of or of being left out. That party experiences a heightened sensitivity that interferes with their participation in mediation.

In working with people experiencing such a heightened sensitivity, it is necessary to reassure them that their concerns are being considered and taken seriously. That is not to say, however, that they should be appeased. Where a party is not realistic regarding their case and possible settlement parameters, it is necessary to educate them on the law and why what they want is not going to happen.

This presents a good opportunity for the mediator and counsel to address what the party's life will look like if the case does not settle. They should explain how long it will be until the case goes to trial (frequently years), as well as the additional fees and costs that will be incurred, and the likelihood that any proceeds the party receives in the future will be significantly diminished. Lastly, it should be explained that, even after all of that time and expense, there is no guarantee, and little probability, that the party will get the result they want.

This also presents an opportunity to emphasize the rewards of settlement, such as the certainty of the result, and more importantly, the ability to regain some form of control over the circumstances in which the party finds themselves.

If these efforts are successful in getting a party with heightened sensitivity to accept that they are not being taken advantage of and that the probability of success is low or, at best, uncertain, often they will begrudgingly be more amenable to entering into a settlement agreement.

VIII. IMPASSE NO. 8: "MOM LOVED YOU MORE!" (DYSFUNCTIONAL FAMILY DYNAMICS)

There are cases where one party hates the other for no apparent reason, and that emotion is driving the litigation and inhibiting settlement. The hated party may not even

realize that it is these feelings, as opposed to the merits of the case, that are impeding the settlement process.

In psychology, there is something known as attribution theory, which is divided into two categories: situational attribution and dispositional attribution.[04] Situational attribution arises when external factors are the cause of anger or discomfort. It can be related to something over which one has no control, like the weather. If one is traveling and misses their connecting flight due to bad weather, they will be upset and unhappy, but there is no one to blame. The person's anger arises from a situation created by external factors or influences.

Dispositional attribution arises from internal factors that are case specific. The affected party assigns responsibility for their grievance to the other party or parties based on perceived motives, beliefs, or personality. There may be no apparent rationale for the feelings the aggrieved party is experiencing, but the aggrieved party only wants to inflict pain. Often, this results in the other party giving up more than they want or reasonably should just to reach a settlement and stop the pain of continued litigation.

When apparent, this dynamic presents an opportunity for the mediator and counsel to explain the need to compartmentalize emotions to the party experiencing strong feelings. The mediator and counsel should emphasize that this is a business transaction and needs to be addressed in that way. Hopefully, this will help the aggrieved party step away from their feelings and approach settlement more objectively.

Often, the aggrieved party is preoccupied with what the other side will get through settlement. In such situations, the mediator and counsel may attempt to re-focus the aggrieved party's attention on the evaluation of the applicable law as applied to the instant set of facts and circumstances. It may also be helpful to emphasize to the aggrieved party the benefits of settlement.

One case involving dispositional attribution comes to mind that required extreme steps to reach a resolution. A few years ago, I mediated a case involving the distribution of 13 trust real properties between two sisters. Under the terms of the trust, the distribution of assets between the two sisters was to be equal. Since the values of the properties had been agreed upon, it seemed at first that it would not be difficult to reach an agreement on a non-pro rata division of the properties between the sisters, but that turned out not to be the case.

Sister A was a successful professional, happily married with adult children. Sister B, while able to support herself, had a less prestigious career, was not married and did not have children. Although each sister's situation was not based on anything to do with the other sister, Sister B bitterly resented Sister A. Sister B's anger was palpable and not rational. There was no way to reason with her or explain how the numbers worked. If Sister A wanted any particular property, Sister B was bound and determined to prevent it and claim it for herself.

Sister A wanted to move on with her life and put the trust matter behind her. Sister B gained strength from continuing to engage Sister A and cause her pain by not agreeing to resolve the property distribution.

Sister B had two attorneys representing her at the mediation. It was clear over the course of the day that they were having difficulty getting her to agree to anything. As time went by, they loosened their ties and unbuttoned their collars, their hair became mussed as they ran their fingers through it in frustration, their jackets came off, and by the end of the day, their shirttails were hanging out of their pants. They were exhausted.

On the other hand, Sister A was at the mediation in good faith and wanted a fair resolution. As the mediation progressed, however, it became clear that a fair resolution could not be reached by agreement. Sister A, her attorney, and I had a frank discussion about the irrationality of Sister B's behavior and that it was unlikely an equitable result could be reached through mediation. While Sister A understood and agreed that Sister B was being unreasonable, she did not understand the source of Sister B's anger, and at the end of the day, Sister A simply wanted to move on with her life.

As the hours passed and the distribution of each property was discussed one by one, it was painful to watch as Sister A repeatedly caved to Sister B's demands. By the end of the day, many hours later, it was agreed that Sister A would receive the one property that the parties had agreed prior to the mediation would go to her and Sister B would take the remaining 12 properties. This grossly inequitable result was truly the only way Sister A could get out of litigation and move on with her life without going to trial.

IX. CONCLUSION

When faced with an impasse, it is incumbent on the mediator to try to identify what "pressures" are getting in the way of reaching a settlement. Once that determination is made, it is the job of the mediator to work with counsel and the parties to acknowledge the impasse, address the pressures creating it, and attempt to work through it. One cannot just throw up their hands. In many cases, it only requires a very small shift in perception or attitude by one or both of the parties to break the impasse, after which it

is possible to reach a settlement. It can take many hours of arduous effort to get to that point, however, but that is an essential task for the mediator, the reward for which is the gratifying result of settling the case.

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01 See Goetz, *Weaponizing the Litigation Process – When Litigation Results in the Taking of Hostages* (Cal.Law.Assn. 2021) Vol. 27, No. 2, Trusts & Estates Q. 44.

02 Dictionary.com <https://www.dictionary.com/browse/impasse> (as of Sept. 12, 2022).

03 I've been known to stand in front of the conference room door so no one can leave. With Zoom, that presents some difficulty.

04 See McLeod, *Attribution Theory in Psychology: Definition & Examples* (June 11, 2023) Simply Psychology < https://www.simplypsychology.org/attribution-theory.html> (as of Oct. 3, 2023).