THE INDIANA LAWYER.com

Hays & Lee: Prepare to break through mediation impasses

May 2, 2018


Hays

By Thomas C. Hays and Molly E. Lee

Merriam-Webster defines impasse as a "predicament affording no obvious escape; deadlock." A primary reason for an unsuccessful mediation is when an impasse occurs and parties are unwilling to compromise further to reach resolution. Lawyers representing clients in mediation should see it coming and try to avoid it if they really want to settle their case. Avoiding an impasse should not only be the duty of the mediator, but of participating counsel.

A good start would be to have all parties present at mediation. In tort cases, it is too easy for an absent insurance representative to say no over the telephone. While it is understandable not all out-of-state insurance representatives can be present for every mediation, there should at least be an effort to have a local representative present with authority and knowledge of the case.


Lee

Another consideration is whether the case is ripe for mediation. Has there been sufficient discovery so both sides can appropriately evaluate liability and damages? Have key depositions been taken? Has the trial date been set so that the parties can get serious?

Clients must be prepared for what to expect from the mediator, opposing parties and counsel, and have a general sense of how the process works. I have seen mediations where the attorney is just meeting in-person with his client for the first time and it takes the 90 minutes for them to simply get on the same page.

The parties and their attorneys should anticipate any issues that may hinder mediation and attempt to resolve beforehand. Are there indemnity or insurance issues to be resolved? Have you obtained answers to any pending coverage questions? Have you put lienholders on notice? Recognized any Medicare issues? Updated your evaluation to the client well in advance of the mediation?

If impasse rears its ugly head, counsel should be ready to join with the mediator and assist their clients in some well-known impasse-breaking methods. Some examples include:

1. Identify the goal. At the outset of mediation, the parties should develop criteria for an agreeable solution.

2. Take a break. Mediation can be long and tiring. If an impasse is looming, ask the mediator if you can take a short break or lunch break to get clients refocused.

3. Know your client's needs. Our wants and needs usually differ. The plaintiff's counsel must know in advance what his or her clients' needs are, or if they are being met by the amount of money being offered. They may be seeking enough money to pay off a school loan, credit cards, take a vacation, etc. These needs (not wants) may force the party to reassess and view the negotiations in a new light. If a party can be persuaded to assess his or her needs, then the case may settle even if the amount is not as high as the party originally desired. In larger cases, the introduction of a structured settlement through periodic annuity payments may address the actual needs of the plaintiff party while addressing the plaintiff's desire to obtain a particular settlement amount.

4. Compare money now vs. trial. One obvious point in litigation is all attorneys should, prior to and during the mediation, advise their clients of the costs of going to trial and remind clients that even if he or she prevails at trial, the costs of trial are weighty.

5. Analyze risk. Experienced attorneys should foresee that the mediator will be pointing out the strengths and weaknesses of their case with them and their clients. Counsel should have their clients prepared in advance of the mediation concerning their expectations and help them assess the risk of winning or losing. If a plaintiff's attorney tells his client that he or she has a 70 percent chance of winning, the attorney should also be prepared for the conversations from a good mediator who would ask, "Would you spin the wheel if you had a 30 percent chance of losing everything?"

6. Be prepared for the bracket. Lawyers on both sides of a case can be discouraged by the large disparity between offers and demands. After several hours of mediation, the suggestion of a bracket by either the mediator or one of the participating attorneys can help counsel narrow the gap. For example, plaintiff's demand is $200,000 and defendant's offer is $20,000. The plaintiff or the mediator may suggest a bracket that they will come to $150,000 if the defendant will pay $75,000. The defense will caucus and likely decline the bracket proposed, but may offer his or her own bracket that the defendant will offer $50,000 if the plaintiff comes to $100,000. The key to this process is that the parties should not submit a bracket unless they are willing to pay the mid-point, which is always assumed by the opposite side. A good mediator will attempt to get the parties to negotiate between those mid-points as the mediation goes forward. In this example, plaintiff's midpoint is $112,500 and defendant's midpoint is $75,000.

7. False quit. Parties sometimes negotiate to an impasse simply as a strategic decision, when they secretly know that they have more room to negotiate. If you convey to the mediator that you are going to quit, it may prompt the party in the other room to confess that he or she is not willing to give up.

8. Identify settlement tools other than money. In certain family business disputes or sensitive commercial cases, a simple apology may get a case settled. Remember that there are viable settlement tools beyond money. The litigator must keep in mind his or her client's goals and remember options to settle a case that do not involve additional money, i.e., apology, letters of recommendation, social media posts, non-competes, etc.

9. Suggest a mediator's proposal. A mediator's proposal can help settle a case. Following or at the very end of a failed mediation, the mediator confidentially recommends to each side a certain settlement amount to the parties. The parties are given a specific time frame to either agree to or reject the mediator's proposal. If both parties agree to the proposal, the mediator advises that the proposal was accepted and the case is settled. If the parties do not agree, the mediator simply advises the parties that the case has not settled and does not reveal to the parties who accepted or rejected the proposal. Many times, this gets the clients to take a fresh look at their position and agree to the proposal of the third-party mediator.

10. Reversing the deal. In commercial cases that involve negotiation in which one party is offering to buy out the other, sometimes an offer to reverse the deal will break impasse.

11. Getting the parties together. There are times when articulate and astute clients may be able to settle a case that is based upon their respective needs rather than the niceties of the legal positions that are being addressed by the attorneys. Sometimes letting the clients get together with the mediator and without the attorneys can be beneficial.

In conclusion, mediation can surmount the stumbling blocks impeding settlement. Counsel and their clients, along with the mediator, must identify and address the issues that determine whether the case will settle. Honest conversations with the client and the mediator will carry the day and help the case settle and possibly avoid a poor result at trial.•

• **Thomas C. Hays** *is a partner and* **Molly E. Lee** *is an associate at Lewis Wagner LLP. Opinions expressed are those of the authors.*