

# “And the Walls Came Tumbling Down:” Overcoming Impasse in Mediation

## OVERCOMING IMPASSE IN MEDIATION

- I. What is LATNA?
- II. Identifying Barriers to Settlement
- III. Tactics That Impede Settlement
- IV. Diffusing Tactics
- V. Arbitrating or Litigating the Dispute or Selected Issues
- VI. Refusing to Agree/Exit Strategies

## OVERCOMING IMPASSE IN MEDIATION

### I. LATNA?

- A. What is it?
  - 1. Consider the “best,” “worst,” and “most likely” alternative to a negotiated agreement = **likely alternative to a negotiated agreement** or **LATNA**
  - 2. Serves as the rational starting point or basis for evaluating offers
  - 3. Do not reject **any** settlement offer that is better than or exceeds one’s LATNA (i.e., that delivers more value to a party than that party’s most likely alternative to settling at mediation).
    - a. **Exception:** when one believes the other side(s) may offer something even better down the line.
  - 4. Prior to mediation, one should speculate about the other sides’ no-agreement alternatives.
- B. Why is LATNA Such an Important Concept?
  - 1. People often come to mediation with aspirations and “bottom lines” that do not reflect their true no-agreement alternatives.

2. They reject settlement offers because they have an artificial notion of what they *should* be entitled to pay or receive
3. They resist listening to information that might alter their assessment of their no-agreement alternatives.

**KEY POINT: Your “bottom line” in any negotiation should reflect your LATNA. Your challenge will be to determine if there is anything you can offer to the other side that will exceed *their* LATNA**

## **II. Identifying Barriers to Settlement**

- A. Step into the mediator’s shoes: diagnose the source of the impasse
  1. What is the principal barrier to settlement we are now facing?
  2. Is the barrier on our side or theirs?

## **III. Tactics That Impede Settlement**

- A. Three Common Tactics
  1. “*Good cop - Bad cop*”: One party acts outrageously to make his/her colleague appear more reasonable and attractive in contrast.
  2. “*Let me check with my manager*”: Like a car salesperson, this party strikes a deal, writes it up and then calls a manager for final approval only to discover that the manager *insists* on just a few more concessions.
  3. “*The MAD negotiator*”: This person hopes that the other side(s) will give up on rational negotiations and just try to appease him/her.
- B. Other tactics that impede resolution include:
  1. Misrepresenting one’s own interests.
  2. Misrepresenting one’s no-agreement alternatives.
  3. Misrepresenting one’s constraints and/or bottom line.
  4. Raising new issues in the 11<sup>th</sup> hour as the parties are about to close on a settlement agreement.

5. Pretending to search for win-win solutions to drag out the negotiations delay.
6. Pretending not to be sensitive to litigation costs.
7. Switching spokespeople mid-stream to confuse the other side(s) and to enable the client to distance him/herself from “unauthorized concessions.
8. Threatening to walk out the door. Threatening to close the door forever on future settlement discussions.

#### **IV. Diffusing Tactics**

- A. *Ignore the tactic and proceed as if nothing has happened* – avoid reinforcing the negative behavior and stay focused on settlement.
- B. *Calmly note the tactic and neutralize it* – this allows you to indicate that you recognize the tactic while enabling the other party to retreat from it without a huge loss of face.
- C. *When turning the other cheek is neither satisfying nor effective, it may be appropriate to mirror the tactic and respond in kind and proportion* – the key here is to respond *in proportion* so as not to escalate the dispute but to communicate to the other party that the behavior is not only ineffective, but will damage the entire process if it continues.
- D. *Finally, you may be tempted to call the person on his/her behavior and label it in some way to indicate that you recognize the ploy and will not be swayed by it.* There is a risk that the other party will deny employing a tactic and express offense. If that happens, link the label with a proposal to clarify the ground rules for the negotiation, and renegotiate the process if needed.

**KEY POINT: Think about how you can prevent the use of tactics in the first place and what you can do if confronted with them during negotiations. Also, think about how the mediator can help you prevent or respond to these and other tactics.**

#### **IV. Arbitrating the Dispute or Selected Issues**

- A. Upon Impasse - Consider a Focused Arbitration
  - 1. Narrow the scope to one or two issues and submit those to a neutral decision-maker.
- B. Upon Impasse – Consider a *Med-Arb*
  - 1. Benefits
    - a. Efficiency
    - b. Faith in neutral's ability to decide issue(s) fairly and appropriately
  - 2. Concerns
    - a. The mediator will have had access to confidential information and one or more parties may feel that such knowledge will “taint” the arbitrator's decision.
    - b. If parties anticipate using the mediator as an arbitrator, they may not share confidential information with the mediator - limiting the value the mediator can have in the mediation itself.

#### **V. Refusing to Agree/Exit Strategies**

- A. Think carefully about an exit strategy and the message you want to leave
- B. Position yourself to be open to renegotiation if a truly substantial movement surfaces from the other side(s).
- C. You also want to position yourself if your predictions about the case turn out to be wrong – it may be that it is *your* side that needs to make the next substantial move.
- D. Avoid saying something you may need to retract later at the expense of your credibility such as “There is no way we would ever agree to X...”.

**KEY POINT: Alienating the other parties will not serve you in the long run.**

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