Thoughts about Impasse for Mediators in Court Programs

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I write to complement Professor Dwight Golann's very thoughtful and useful article about dealing with impasse. My goal is to offer thoughts about the impasse problem through the lens of a court-sponsored program. These perspectives and approaches may be especially (but not exclusively) pertinent to mediators who are serving, or who are likely to be perceived by litigants as serving, as agents of judicial institutions.

A court mediator's overarching mandate is not to secure a settlement but to proceed with a visible integrity that inspires the respect and confidence of all participants. Moreover, court ADR programs are, centrally, in the service business. They exist to try to help litigants. Given these mandates, how should court mediators frame their objectives with respect to impasse? Their primary goal cannot be to “break” impasse; mediators are not supposed to be in the business of “breaking” anything. Rather, their objectives should be to help the parties explore and understand the sources and character of their apparent impasse and to help the parties determine whether they can move beyond it. We must remind ourselves that some impasses are real and not reversible, and that there is nothing inherently bad about real impasse. A mediation that ends because of a real impasse is not a failure by anyone. If we forget these truths, we will be tempted to try too hard to “break” real impasses—and in so doing we risk invading party self-determination and the values enshrined in the Seventh Amendment.

Our targets are the impasses that are premature, artificial, or unnecessary. As Professor Golann reminds us, apparent impasse is as perennial as the grass. Because the shoals of apparent impasse so regularly threaten the ships of settlement, when serving as mediators we must learn not to panic when we detect them; we must keep a steady focus on helping the parties avoid unnecessarily running aground. Although it is sometimes possible to free grounded ships, they are far more likely to reach their destinations if no such effort is necessary. So one of a mediator's principal tasks is to help the parties steer clear even of apparent impasse.

How can we do that? I believe the keys lie in being transparent about our process and ourselves, actively including the parties in making process decisions and in analyzing process problems, remaining open throughout to learning from the parties, and teaching and counseling the parties about the ways their process choices and negotiation conduct can affect the viability of the mediation.

By being transparent about ourselves and our process,
and by actively encouraging the parties to pull the lead ears in probing their circumstances and making process decisions, we demonstrate and communicate respect. Being transparent and involving the parties directly in important decisions about how to structure and manage their mediation signals to them that we consider them equals—partners in a jointly undertaken quest to determine whether they can resolve their dispute by agreement. A party that is treated as a peer, that is not patronized, will feel respected. And respect (from without and within) is one of the great liberating and energizing forces in human interaction. When we give and model respect, we encourage parties to embrace the spirit of mediation.

It is especially important for mediators in a court program to proceed in a visible spirit of respect. Our respect for others begets their respect for us, for the judicial system, and for the democratic government of which that system is such an important part.

There is another important way transparency can serve as a significant source of energy and tenacity when the process stumbles. Transparency attacks fear—especially fear of being manipulated or “taken”—fear that can lock parties into a rigidity that can artificially block their access to the most favorable terms. By displacing fear and suspicion, transparency begets trust. Trust begets connection and rapport. And when rapport connects parties with their mediator, there will be more openness in the search for sources of apparent impasse and more energy in the search for ways out.2

Moreover, by being transparent about ourselves and our process, we encourage the parties to follow suit. Our example can encourage interparty transparency by showing the parties that transparency need not be threatening and by suggesting how transparency can contribute to the mediation process. Interparty transparency can increase interparty trust—which, in turn, can increase both flexibility and openness about underlying interests. For example, I have seen tensions between parties subside when a defendant volunteers to disclose to the plaintiff information that might not be discoverable but that the plaintiff feels is relevant to determining whether proposed terms are fair.

Transparency also can be a great tool for teaching. For example, we can use the way we describe our role during our opening statements to discourage, indirectly, kinds of behavior that increase the risk of artificial impasse. In my opening statement, I tell the parties and lawyers that one of my goals is to help the parties reduce the risk of “false failure.” Then, I describe some of the common sources of “false failure” that we will be trying to avoid, for example:

(a) “social” errors (e.g., when one person’s verbal insensitivity or aggressiveness drives another person into withdrawal or rigidity);
(b) process mistakes (e.g., when one person prematurely paints himself into a corner);
(c) misjudging how much movement might be possible or what terms might really be accessible (e.g., as a result of excessive posturing or playing cards too close to the vest for too long); or
(d) simply giving up too soon.

This description of an important part of my role reminds the parties about these pitfalls and encourages them to moderate their behavior to reduce the threat they pose.

Professor Golann reminds us how important it is to pull the parties directly into “solution-finding” when a mediation seems to have stalled and thus to encourage them to assume responsibility for the viability of their process. It is especially important in a court-sponsored mediation to do everything we can to encourage the parties to appreciate that the mediation is their process, not the court’s. The purpose of the mediation is to help them, not the court. If there is a false failure, it is they who suffer the harm. We can make this point by reminding the parties that because there will always be a line of cases waiting to be processed through the court system, it really doesn’t matter to the judges how long the line is.

One way to reinforce this message is to turn to the parties for help when matters stall. Ask them to help you understand why things have stalled. Ask them to try to identify the source. Consider asking them to identify the issue or consideration that seems to be playing the biggest role in separating the parties. Help the parties understand that the most promising ideas about how to remedy stalling need to be tailored to the source; the objective should be to find a procedure for moving forward that will address their process problem at its roots. Then, in private caucus, ask each party if it can think of anything it might do, procedurally or substantively, to get the mediation rolling again.

There is another “transparency tool” we can deploy if the parties are unable to determine on their own why

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Wayne D. Brazil has been a United States Magistrate Judge in the Northern District of California since 1984. He is also a member of the Dispute Resolution Magazine editorial board.
their negotiations have stalled or how to get them back in gear. I call this tool “name it and explain it.” If we think we know what the source of a stall is, but the parties can’t seem to identify it, or if the parties have engaged in conduct that has damaged the process, or if they are following a negotiation path that we know often leads to a cul-de-sac, we might help them by saying something like this: “I have seen a situation like this arise in other mediations I have hosted. In those other cases, the unintended source [or effect] of the situation has been X, which has caused the parties to lose momentum in their negotiations. Fortunately, I also have seen parties move forward by [following a course or taking a step that you identify]. Do you think we should give that a try here?”

In a variation on this theme, we might say something like: “I’ve seen parties in this situation in other cases, and it has turned out that what was getting in the way of further progress was X. Do you think that factor is at play at all here?”

It is preferable, of course, to coach the parties before they take steps that might be counterproductive. I often find that, in private caucus, parties want to identify and analyze, with me, two or more possible next steps or larger process options before they decide how to proceed. They want my input. They want to know, given what I have learned in private caucuses about the other parties and given my experience, what I think is likely to happen if they do X or if they do Y. Or, sometimes a party will tell me in advance what he or she intends to do next in the mediation, but I am very concerned that that contemplated move would inflict serious damage on the process.

These occasions present ideal opportunities to engage in interactive counseling, to talk negotiation “theory” with a party (but not too abstractly). We can explore why the party thinks a move he or she is considering might be counterproductive. I often find that, in private caucus, parties want to identify and analyze, with me, two or more possible next steps or larger process options before they decide how to proceed. They want my input. They want to know, given what I have learned in private caucuses about the other parties and given my experience, what I think is likely to happen if they do X or if they do Y. Or, sometimes a party will tell me in advance what he or she intends to do next in the mediation, but I am very concerned that that contemplated move would inflict serious damage on the process.

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There are a considerable number of other ways that we can handle our roles as mediators that may reduce the risk of premature or false impasse. I will focus on just a few here. All of these relate to how we talk about the merits of the case. First, we should use the manner in which we share our views about the merits to remind parties about how analytically fragile and unpredictable litigation usually is. We should preface our comments on the merits by pointing out that we cannot be certain what evidence will make it to the trier of fact or how the trier of fact will respond to that evidence (especially when the trier of fact will consist of 7 to 12 people about whom, at this point, we know nothing). We should never overstate the level of our conviction, and we should always preface our comments with express and specific qualifiers and conditionals.

We should emphasize how many variables are at play in the typical litigation drama and how difficult it is to anticipate reliably how they will unfold and affect one another. The more variables we identify, the more opportunities we provide the parties to reconsider their analyses and to make, or justify, or sometimes rationalize the kinds of adjustments in their positions that can be necessary to move the negotiations beyond apparent impasse.

As mediators in court programs, we also must be especially careful to make it clear that any views we express about the merits are not in the nature of judgments (of people, conduct, or anything else), but in the nature of educated guesses about what the evidence will be, what inferences of fact might be drawn from that evidence, and how the law will be construed and then applied to those facts. As Professor Golann suggests, we should emphasize that we are engaging only in potentially quite fallible exercises in prognostication, nothing more.

If we are pressed to express an opinion about the monetary value of the case, we should take care to distinguish, explicitly, between judgment value and settlement value. They are not the same, and making sure that the parties understand the distinction can help expose the role and the magnitude of uncertainty in the parties’ situation. Moreover, if, during a mediation, we confine our initial discussion of money to the judgment value of the case, we leave room for the parties (and us) to move to quite different views about the case’s settlement value.

A few additional points about how we express our views warrant brief discussion here. Professor Golann describes helpfully the technique that is known as the mediator’s proposal. He suggests that the mediator explain to the parties that this kind of proposal is not the product of the mediator’s assessment of the merits of the case but of his or her effort “to find a set of terms that both parties will decide, however reluctantly, is better for them than litigating the case through trial.” Because mediators in court programs should be especially careful to avoid
giving the impression that they are passing judgment, I suggest that we go a step further by stating explicitly that, when we offer a "mediator’s number" we are engaged solely in an exercise in "sociology," meaning that we are trying to pick the number that, as a matter of "sociological" prediction, and nothing more, has the best chance of being accepted by both parties. In other words, we are making our best guess about what might work, not suggesting what should be.

Professor Golann describes one type of opinion that mediators might offer when trying to help parties move past an apparent impasse that I do not think mediators working for a court should voice. He suggests that in some circumstances mediators might comment on the substantive views or inclinations of the assigned judge. As an example, he indicates that, as a preface to commenting on the attractiveness of an offer or demand, a mediator might say, "In light of what I know of Judge Jones’s attitude toward discrimination cases [the offer on the table may warrant serious consideration]." This kind of comment, unfortunately, could be construed as suggesting that Judge Jones is biased—that instead of applying the law in a neutral, straightforward manner, he bends the law in a direction that favors, without legal justification, one side. This kind of statement is likely to reflect an insufficient appreciation of the subtleties and complexities of litigation, of judges, and of the real world. But even if it were supported by an unassailable empirical analysis (which no one is likely to have undertaken), such a statement should not be made by a mediator who is working under the sponsorship of a court. We deserve our highest purposes if we seem to impugn the integrity of the institution of government for which we labor.

In another place, Professor Golann suggests that a mediator might say, "Given Judge Smith’s rulings in IP cases I think you have a 30 to 40 percent likelihood of prevailing on liability at trial." Although less troublesome than the comment about Judge Jones’s “attitude toward discrimination cases,” even this kind of statement may be ill advised. First, it suggests a level of knowledge of the Judge’s body of work that no mediator is likely to have. Second, it exaggerates the degree of transportability of rulings (even rulings by the same judge) between individual cases. Every case is different—and generalizing from any one set of fact-specific circumstances to another carries a high risk of unreliability. Third, statements like this give a false patina of precision or mathematical certainty to what are really only guesses—and as representatives of the judicial system we should not be in the business of giving false impressions. Fourth, the trier of fact in most IP cases is a jury, not a judge—so unless our hypothetical mediator is focusing only on claim construction, this statement miscommunicates where the real decision-making power will lie during the trial of an IP case.

For mediators in court-sponsored programs who are called upon to express opinions about the merits of a case, it is preferable to do so in more general terms. There is less risk that opinions on the merits will do violence, unintentionally, to the realities of the parties’ circumstances if mediators say something like: “Based on everything I have learned, I feel that the odds of liability being imposed are pretty good—but, of course, there can be little or no certainty in any of this.”

Among the many helpful suggestions that Professor Golann makes, there is only one other that I think mediators in court programs should be hesitant to adopt. Golann suggests that if linked moves are not successful you can sometimes obtain a concession by asking for it explicitly. (“If you could make one more move to help break this deadlock, I’d appreciate it. I would tell the defense that you . . . only agreed to this because I asked you.”) It is easier for a disputant to make an additional concession if it is portrayed as a special gesture to the mediator” (emphasis added).

For mediators who are serving in court programs, there is a risk that such a request (or “plea”) will be perceived as coming not just from the mediator, but from the court. If perceived as a request or plea from the court, words such as these may be misunderstood as a form of institutional pressure. Given litigants’ rights under the Seventh Amendment, it is not at all clear that courts should be making “special pleas” to litigants to settle their cases or asking litigants to make “special gestures” to their mediators (and, through them, to the courts). Moreover, there is a risk that litigants will fear that if they do not acquiesce to such requests, the court will be unhappy with them and will exact some form of revenge. Some litigators have told me that they are afraid that hosts of our mediators will tell the assigned judges which parties have refused to accede to mediators’ pleas for movement, even though our court has formally adopted rules that would prohibit any such communication. We need to avoid triggering such fears.

**Some Addenda to the List of Techniques Described by Professor Golann**

It would be a mistake to let the few precautionary thoughts in the preceding paragraphs obscure our debt to Professor Golann for providing such an impressive group of creative ideas for dealing with apparent impasse. To further complement his work, the last section of this article provides mediators with a few additional ideas about how they might respond to apparent impasse.

- Never underestimate the power of fairness.5 Most people want to perceive themselves as fair. Most people want to feel good about how they have behaved and how they have treated others. One way to tap these forces is to identify and to explain the rationale that informs external norms that are recognized as legitimate and that would support making additional adjustments in a party’s position.
- Remind parties that often a key to settlement is to make an offer or demand that makes it very difficult for the other side to walk away. A negotiating party can increase its leverage by offering terms that increase
the other party's apprehension that later it will regret not closing the deal.

- Discuss the pros and cons of making a formal offer of judgment under Rule 68 of the Federal Rules of Civil Procedure or a comparable state law (e.g., in California, under CCP 998). Recent research suggests that parties that go through the process of developing such an offer might consider their circumstances more systematically and, perhaps, more realistically, than parties that do not.6

- Ask each party, in private caucus, whether it can think of any information, argument, or consideration (related to the case or not) that has not yet been discussed during the mediation, or on which the other side might not have focused, that you might be able to use to help the other side justify or rationalize additional movement.

- If a source of impasse is a party's or a lawyer's fear of being second-guessed or criticized by some person or group that is not present, consider bringing that person or group directly into the process (perhaps by phone, video conference, or even by moving the negotiations to their turf).

- If a source of impasse is a party's fear of leaving something on the table, or fear of being "bested" in the negotiations, make it clear to that party that you have done everything you can to uncover the best offer or demand that might be made by the other side.

- It can reduce the risk that fear of leaving something on the table will cause impasse if, when the negotiation process gets under way, the mediator encourages reciprocal and relatively balanced incremental moves by both sides and patiently indulges this process for longer than might seem justified. The longer you work at this kind of process and the greater your visible tenacity, the less likely a party is to fear that it would be missing some significant possible gain by agreeing to terms. If it appears that the parties really have exhausted the potential yield of this process, the mediator might tell each party that he or she will have just one final opportunity to try to bridge the gap before you give up.

- If a source of impasse is a party's fear that he or she will feel diminished by agreeing to settle (e.g., that settling represents or would be seen by others as a failure, or a shortfall of conviction or courage, or an abandonment of principle, or an oblique admission of fault), offer that party information about how the proposed terms compare to settlements in other cases and explain that people who have experience in such matters understand that defendants only offer terms that are this attractive (if they are) when the defendants recognize the strength (or perhaps righteousness?) of a plaintiff's case. Explain (if true) that in the world of litigation, a settlement in this category of case on the terms being proposed would be perceived as a victory, a vindication.

- If a source of impasse is a party's failure to understand or acknowledge the likely consequences of failing to settle, ask the party to describe very specifically what each of the remaining components of and steps in the litigation process will consist of and what each is likely to cost. In addition, ask the party to estimate how long each remaining component of the litigation will take, and then to give you a fairly detailed picture of what the party's situation will be, after the trial (or appeal), if he loses. You might say: "Let's try to get a sense of what the litigation alternative to settlement is likely to consist of here. Maybe you could describe for me, as specifically as you can, what the procedures are that will be followed and what the actions are that will be taken from here through the end of the litigation. Then we'll try to construct a specific picture of what your situation would consist of if, at the end of all this, your opponent prevails." Be sure to explain that you are not asking the party to work through this in order to pressure him or her to settle, but because your job, as the neutral, is to help each party understand as clearly as possible what each of that party's alternative courses are likely to entail.

- If, in private caucus, you make up a hypothetical offer or demand to probe for possible movement, make it very clear that the other party is not the source of the terms you are discussing and that that party has not intimated that it might accept those terms. Do not include terms in such a hypothetical that the other party is quite unlikely to embrace.

- In appropriate circumstances, consider with the parties whether it might advance the settlement ball for you to step beyond the immediate circle of the mediation in any of the following ways:
  - By going to speak to persons or a body whose support or approval is needed, e.g., at a meeting of a union local, a city council or planning commission, or a board of directors;
  - By moving the mediation to some other location, e.g., where a site could be viewed and explained firsthand, or where other affected or interested persons might be able to observe or participate (e.g., an Indian tribe's headquarters or a cooperative apartment complex);
  - By visiting (with the parties) the site of an important event or the source of significant evidence, or by observing a demonstration, experiment, or test;
  - By attending a sensitive deposition or an important hearing (judicial or administrative), e.g., a Markman hearing, in which the judge construes the meaning or reach of disputed terms of a patent.7
  - By approaching a nonparty to seek its participation or cooperation, e.g., to provide information, remove a lien, grant a license, join a venture, etc.;
  - By helping draft sensitive language in a press release, a letter of recommendation, an apology, an

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entry in a personnel file, the words an ex-employer is to use in responding to inquiries about a past employee, or important paragraphs in the settlement agreement; or by volunteering to mediate or to serve as a final arbiter of disputes about such language.

In carrying out any such tasks, remember that you represent the system of justice in our democracy and that the measure of your success is not whether the parties settled their case, but whether your conduct inspired their respect. ◆

Endnotes

1. The closeness of the connection, or perceived connection, between a court and a mediator who is serving through a court program can vary considerably. It is closest when the mediator is a judge or an employee of the court. But even private mediators who receive no compensation from the court may be perceived as its agents—especially if the court has ordered the litigants to participate in the mediation and has selected the mediator.

2. See the results of the recent instructive surveys conducted by Professor Stephen Goldberg and JAMS mediator Margaret Shaw. Stephen B. Goldberg and Margaret Shaw, The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three, 23 NEGOTIATION J. 393 (October 2007); Stephen B. Goldberg, The Secrets of Successful Mediators, 21 NEGOTIATION J. 365 (July 2005); see also Janice Nadler, Rapport in Negotiation and Conflict Resolution, 87 MarQ Rev. L. Rev. 875 (Special Symposium Issue 2004).

3. I am indebted for this idea and many others to Sam Imperati, a seasoned mediator who has practiced in Oregon for many years and who has considerable experience teaching mediation and negotiation skills to lawyers and judges.

4. Generally, we should be most reluctant to opine about the merits of the case (or some aspect of it) unless and until we are sure that the parties would welcome our sharing such views. And we should decline to express any views about any aspect of the merits of the case until after we have gently but thoroughly probed the content of and bases for the parties’ views. It is especially important to honor these admonitions in court-sponsored mediation programs—where it is critical to retain the parties’ confidence in our open-mindedness, in the care we take to acquire sufficient bases for any opinions we develop, and for our fairness.

5. This point emerges with some force in Howard Raiffa’s seminal book, THE ART & SCIENCE OF NEGOTIATION (Harvard University Press 1982).
