



## How to Overcome an Impasse at Mediation

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Despite the best efforts of the parties and the mediator, there may come a time during the mediation when the negotiations hit a wall and the dialogue breaks down. The reasons for the breakdown may be varied, but the common thread is that it is up to the mediator to revive the settlement discussions.

So how does the mediator do this? It may be as simple as getting the parties to go outside for some fresh air, have a snack or just changing the topic to last night's game. Much like a hostage negotiator, a mediator should try to keep a dialogue going, even if it is not always directly focused on the settlement negotiations.

If those options don't do the trick, the mediator has a few other tools in his or her toolbox. This article explores three of those tools: (1) the best and final offer; (2) settlement brackets; and (3) the mediator's proposal.

### Best and Final Offer

The BFO is a party's bottom line, usually revealed only once the parties reach an impasse. A BFO is usually a last resort because the message is that there is no room for negotiation. While a BFO may not result in a settlement at the mediation, it could set the tone for future negotiations by giving a party a reality check on the other side's settlement posture.

## Settlement Brackets

Another tool for overcoming an impasse is a settlement bracket. Brackets are often used to bridge a substantial settlement gap when time is running out and smaller moves are likely to be unproductive.

The way it works is that a party (or even the mediator) will propose an upper and lower limit of a settlement range that each party must commit to in order to continue the settlement negotiations.

For example, if party A is at \$50,000, and Party B is at \$500,000 and they reach an impasse, Party B could propose a bracket whereby Party B will reduce its demand to \$350,000 (a reduction of \$150,000) if Party A increases its offer to \$100,000 (an increase of \$50,000).

Party A then has three options: (1) accepting the bracket, at which point the negotiations will continue on a course between \$350,000 and \$100,000; (2) rejecting the bracket and continuing the negotiations based on the status quo; or (3) countering with an alternative bracket at some other range.

Brackets can be controversial because the signals they send may be unclear and/or misinterpreted. To illustrate, one side may perceive that the proposed range signals a settlement at the midpoint, whereas the other side may believe that the midpoint is the new ceiling for the negotiations. Using the proposed \$100,000-\$350,000 bracket from the example above, Party B may be signaling a settlement somewhere in the middle of the bracket (\$225,000). However, Party A may be envisioning a settlement somewhere below the midpoint (between \$100,000 and \$225,000), which could lead the parties to another impasse in short order.

There is no right or wrong signal when it comes to brackets. Whether the midpoint of the bracket represents the expected settlement range or the ceiling, the key is for the mediator, with direction from the parties, to deliver a clear message with the proposed bracket so there are no misunderstandings.

## Mediator's Proposal

A mediator's proposal also may be an effective tool when reaching an impasse because it gives the parties one last chance to settle the case. It also can buy time for a party that needs to get additional settlement authority, or when a final decision maker is not available at the time of the mediation.

Under a mediator's proposal, the mediator proposes a settlement to the parties at an amount determined by the mediator. Once the proposal is made, each party must decide whether to accept or reject it by a given deadline. If both sides accept it, then the parties

can proceed with preparing a settlement agreement. If either side rejects it, then there is no settlement, and the side that rejected it will not know whether the other side accepted or rejected it.

The key to the mediator's proposal is coming up with a settlement figure that is equally tempting to both sides. While the mediator may or may not disclose the actual number to the parties prior to making the proposal, there should at least be some discussion about a potential range for the number so the parties have an idea of what to expect and have an opportunity to give their feedback. However, even if the mediator's proposal is rejected, all hope should not be lost. In fact, the rejected mediator's proposal can be a springboard to a new round of negotiations, either with or without the mediator's further involvement.

Ultimately, even if the parties decide to call it a day without reaching a settlement, the mark of an effective mediator is the willingness to follow up and keep the discussion alive. While a shiny set of tools certainly can help get the job done, the mediator's persistence, tenacity and "never-give-up" attitude are often what really give the parties hope for a resolution in the face of an impasse.



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