

## **DEALING WITH IMPASSES IN WORKPLACE DISPUTES**

### **Typical Reasons for Impasses in Workplace Disputes (not all inclusive):**

1. Blame
2. Anger
3. Management was given strict parameters by upper level management
4. Lack of flexibility
5. Emotion – fear, anxiety, etc. (a variety)
6. Because of the representative
7. Perceptions
8. Lack of knowledge of the process or other (What is a good case/discrimination)
9. One party does not know what they want
10. Lack of preparation
11. Unrealistic views/opinions
12. Because one does not think the other has a “valid complaint”
13. “Management has the right to make decisions”
14. “I have a good case”
15. “It’s the principle of the thing...”
16. One party does not want to set a precedent
17. Concerns about confidentiality
18. “We have done all we can/are going to do”
19. Strong positions
20. No money
21. Base policy/precedent/regulations
22. “...already had an opportunity to respond”
23. Will go to the table but will not change anything
24. Wrong respondent or respondent too high or low
25. Not enough time
26. They had their minds made up when they came to the table
27. The representatives were controlling the mediation
28. Suspicion
29. Lack of faith in your or one of the party’s abilities
30. Deception

### **Options for Dealing with Impasses**

Coming up with strategies for working through stalemates or even difficult sessions can take a great deal of effort. Some of these strategies may assist you in helping the parties.

## ***Preparation***

Preparation of the mediator (and the parties) is imperative to the successful and effective information sharing of mediation. For programs that provide information to the mediator in advance, preparation consists of obtaining the case information at least two to three days prior to the ADR session to allow you (the mediator) to read over the issues and think about the potential interests and positions of each party. If the parties have not done their homework, mediation time is often not well spent. Both parties should be briefed before mediation concerning the issues and the process.

As a mediator, allowing yourself time to think about the case a bit for a few days and reviewing potential resolutions can often open doors to solutions and sometimes creative ones that work very well for all parties. Anticipate what tactics parties may attempt and how you will address them. The truth is **no one** can afford not to prepare.

## ***Focus on Interests***

Real interests are often the underlying source of any dispute. Managing to listen intently enough during discussion can reveal a potential source that will lead the parties to a quick resolution. Asking “why” questions can assist in getting to interests. “*Why do you want to be promoted?*” “*What are you hoping will happen after...*” “*Why do you want that?*”

You can also help them check the other person’s interests by putting a party in the other party’s place. Give them a different perspective.

Don’t forget to check your own interests as the negotiator from time-to-time.

## ***Creative Thinking***

Don’t dwell on a single solution. Coming up with options other than the “typical option” is sometimes more of a solution. Offering a written apology to a Complainant (which gets shredded at the end of the session) during a mediation session has been one such creative option.

## ***Listen***

Listening requires patience. Listening to the parties makes them more willing to listen to and have faith in you. Look at their eyes and watch their body language. Effective negotiators listen far more than they talk. Did you ever hear anyone say,

*“How can you hear if you are doing all the talking?”* You don’t need to be controlling and constantly asking questions.

### ***Silence***

Being comfortable with silence also takes patience. Silence can be an effective tool in providing parties time to think. You don’t need to be controlling and constantly asking questions.

### ***Ask More Questions***

Quite the alternative of the former. If parties are not sharing enough information, you may have more questions to ask. Remember, asking questions does not always have to be issue related. Ever thought about learning about what motivates someone by asking them about what they like to do in their spare time? Could this possibly lead you to interests of theirs?

### ***Use Paper – Visual Demonstration***

Don’t forget that some people are visual learners (or listeners) as opposed to auditory. Seeing something come together on paper can make things work for them.

### ***Educate The Parties***

This can also be somewhat of a reality check. Explain the process as it exists after mediation – the timeline involved and where the case goes. Education can be done even though you are asking questions if you really want to get someone’s attention.

### ***List Options***

This is usually most effective on paper or on a board for all to see. Listing them visually for the parties also often leads to creative resolutions because people look at them and think, “Why not...”

### ***BATNA***

(Best Alternative to a Negotiated Agreement) This is something that takes development. They could get something. Through mediation a party could get closer to what they feel would be complete resolution than if they wait months and things get worse. This format often calls for the use of pros and cons.

### **WATNA**

(Worst Alternative to a Negotiated Agreement) If the agreement is not accepted, a good, productive employee may be turned into a nonproductive employee purely through lack of trust. If the agreement is not accepted, the employee may continue to negatively interpret management actions that affect him/her.

### ***Get Creative***

Generating options is what it is all about! You have to listen closely to what the parties are wanting to accomplish and then just put the pieces together. Use techniques to assist the parties in exploring creative options and stepping outside the box.

### ***Don't Be Shocked/Don't React***

Keeping your emotions and facial expressions in check can greatly aide in keeping perceptions from rising or falling in favor or against you. It is OK to be caught off-guard, just don't let the parties know it.

### ***Think***

“Think before you speak.” Do you really need to speak? Is the question you are about to ask going to throw the parties off-track? Are you advising anyone? Are you being true to the mediator standards?

### ***Don't Ask So Many Questions***

Asking question after question does not allow much time for the parties to speak. Don't interrupt the parties to ask a question. You don't often have to drag information out of them...they will give it to each other in time, if not, you can assist them.

### ***Count to 10- Slowly and Silently***

This can be used during a rather heated venting session or even when you think all is lost. It makes you and the parties pause to think.

### ***Be Determined Without Being Pushy***

You can be determined to assist parties in providing a positive and fruitful mediation session without “pushing them” into doing something they do not want to do. There is a fine line however, do not let one party interfere with the other.

### ***Be Positive***

Express to the parties that there are often several ways to solve a problem and all may not have been explored yet. Tell them their willingness to attempt to resolve things is the first step to a reachable solution.

### ***Encourage Them***

Encouragement can profit an ADR session a great deal. Parties sometimes think everything is “not looking good.” If a mediator can encourage the parties to talk and explore options even if they may not be viable options, doors can be opened to better communication.

### ***Endear Them***

Reaching someone by mimicking body language, asking about them personally, showing interest, etc., can endear them to you. Communicating with someone on that level allows them to open up to you more and talk more, sharing more information. Everyone has a deep need to be understood. By satisfying the need, you can turn the mediation around.

### ***Give Value***

Giving value often means you are showing a genuine interest in what someone’s issues are and what they are communicating. That can simply mean you are asking questions of concern focused on their issues. Example: *“You sound like you really enjoyed that type of work. Tell me what about it you like so much,”* or *“I realize that you are a very busy manager. Tell me what bothers you most about this complaint.”*

### **Be Confident – Within Reason**

You can encourage the parties without being too confident. A good way to do this is with your posture and not your mouth. Sit up straight, shoulders back. Establish eye contact. Keep your notes orderly. If you tell them you are confident that they will be able to come to some agreement before they have really shared the issues (especially in a removal case), the parties may push the other way just to prove you wrong. Don’t push them into agreement with each other.

### ***Accumulate “Yes’s”***

Every time someone agrees to anything, uses the word “did” or says anything positive about the other person or their organization, total them up. The parties

may not have been hearing how close they are in agreement. Accumulating yes's reduces tension.

### ***Why Not?***

Don't be afraid to ask "*Why not?*" If a supervisor says I have done all I am going to do on the matter, ask "*Why won't you consider negotiating on the subject?*" If an employee says they did not answer the proposed disciplinary action, ask "*Why not?*" If someone says they are not willing to settle, ask "*Why not?*"

### ***Save Face***

Many people are very prideful. This is often especially true of someone who is representing someone. Allow people to "show their stuff", but let them know who is in control during a caucus and do so in such a manner that they still feel important.

### ***Assist in Minimizing Risks***

Assisting the parties in brainstorming about how they can accomplish what they hope for to resolve the problem with the least risks (affects of a third party) can make a resolution much more reachable. Example: As long as the employee works in that division, he/she will never have to work for that person as a supervisor or with that employee.

### ***Warn – Don't Threaten***

Someone can be warned without being threatened merely by asking a question – "*Now, what happens if you don't call in again?*" "*Do you realize that if that paperwork is not turned in on time that the complaint could be re-initiated?*" "*Aren't imposed outcomes often unstable ones?*" "*What could the consequences be?*"

### ***Offer Choices***

Brainstorming options no matter how creative can generate thought. Thought can insight other options and additional communication. Offering choices may consist of looking at the BATNA and/or WATNA. Let the parties know this is where they have power.

### ***Timelines***

A negotiator can encourage the parties to consider their options and/or do research timely because timelines may expire limiting their choices, options and ability to decide the destiny of the issues.

### ***Help Them Choose Their Battles***

At times people have to be reality checked into choosing their battles more wisely. Taking a firm stand on a weak issue or an improbable outcome can distance the parties further from any options they may have for any type of resolution. Remind them the negotiation is about mutual satisfaction, not victory.

### ***Disengage the Parties***

If parties are quarreling verbally, they can be disengaged through a number of tactics such as a caucus, silence, calling a break, body language, questions, distractions, etc. Care should be taken in knowing the appropriate time to disengage and who to interact with. Don't hesitate to ask someone why they feel the need to yell. They may not be yelling at the other person, but for themselves. Encourage them to make "I" statements instead of "You" statements.

### ***Take a Break***

Taking a few moments to regain your mental balance and step away from everything can help you and the parties refocus or come at the issues from a different point of view. A couple of minutes rest can revitalize everyone and calm as well.

## TIPS FOR GETTING PAST IMPASSE

1, **Start gently and with generalities** – don't get too specific too early. Use your active listening skills and build into problem-solving. For example: *“So it sounds like you need a redefinition of your job and a fresh start. Is that something you want to pursue here?”* At the beginning of problem-solving, you are still in the mode of listening much and saying little.

2. As you begin to get into problem-solving, look for opportunities to **emphasize the future** and de-emphasize the past. This provides a nice transition into more active problem-solving, and allows the parties to recognize and affirm the change. Examples (in ascending order of directness):

- At some convenient point, perhaps after a break, say something like: *“We’ve spent a lot of time exploring where you are and how you got here, and that’s important to help me – and you as well – understand what the problems and concerns are. I’d like to suggest we now begin to focus on the future: Where you’d like to be six months from now and how we can get there. Is that OK with you?”*
- If one or both parties seem stuck in the past like a broken record, try being a little more directive (first, of course, do a “self-check” to make sure your party feels heard). You might pause, and say something like: *“It’s clear to me how strongly you feel about what happened here. I think I’ve got a pretty good understanding of the problem. At this point in the mediation, I’d like to suggest that we kind of change direction and commit to finding ways to solve the problem. And what this means is that we’ll need to keep focused on the future – not the past. That may not always be easy. Would you like to try it this way?”*
- If a party commits in principle to “the future” but continues reflexively to wallow in the past, you might remind him/her of the agreement, and suggest a “ground rule” that will allow you to bring them back to the future.

3. **Follow the parties.** It's their dispute, and your job is to help them negotiate and communicate, not develop a solution for them. If you find yourself frustrated because the parties don't seem to be going in the direction you think would be best, there's a good chance you shouldn't be trying to go there.

4. Remember that (a) parties will resist moving to closure too fast, and (b) parties faced with a settlement option reasonably may display discomfort about details and the unknown, although the core idea is good. Therefore, use the **“in principle” technique**, by saying something like: *“Now I know there's a lot of important considerations and details to work through, but IN PRINCIPLE, if you could get a good job in the other division, do you think that might work for you?”*

5. Also, resolve issues involving complex details “in principle” and move on. For example, the parties might agree in principle that an employer will issue a reference letter to be attached to the settlement agreement; you can come back to the exact wording of the letter later.

6. Help the parties **convert their statements** of interests and their ideas, and even their objections, into things that you can work with. To do this, look for opportunities to use transformations like the following:

- *“Would you like to propose that idea as a solution?” or “Can I take that to [other party] as an offer?”*
- *“So you would like {x}. Is there a way we can develop that into a plan?” or “How can you get from here to there?”*

7. An **easel or blackboard** is a powerful tool – a way to display information and options visually, get the parties focusing together on the same “page,” and let you organize how information is translated and displayed.

8. Where there’s an absence of ideas, consider using **“brainstorming”** (in caucus or joint session). This means the parties are encouraged to suggest as many ideas as they can create, without any criticism or interruption; later, they return to the ideas and eliminate or develop them.

9. Help a party find ways to **deal with his/her discomfort** or caution in reacting to a proposal by saying something like *“I see that the proposal doesn’t appear to meet your needs, but let me ask, what would it take to make that proposal into something you could accept?”*

10. Use the opposite of 9 above to help a party **reality-check** his/her own ideas: *“What do you think it would take for [other party] to accept your proposal?”*

11. Hypothetical scenarios are a non-threatening and non-coercive way for you to introduce ideas for parties to consider, and can be an entry to brainstorming. The classic hypothetical is the **“what if”**. Say something like, “I’m just wondering – what if they were to provide a retroactive Quality Step increase – might that be an option in lieu of promotion to meet them half-way?” Be careful not to so overuse “what ifs” that the parties stop being creative themselves and look only to you.

12. A party may be anxious about displaying an offer in development to the other side, but it would be nice to know whether it’s possible. You can ask if it’s OK for you to take **implied ownership** of the idea and test it with the other party, e.g., *“I have an option that I’d like to float for consideration; what if…”*

13. Particularly in cases where the issue is money and valuation is imprecise, parties may be anxious about **“going first.”** You might offer both parties the opportunity to have you simultaneously disclose a mid-point or range between them. This may also be more appropriate for discussion in caucus.

14. Where there is a substantial difference between the parties’ demands (or lack of clarity about valuation), try **“decision analysis.”** Although details of this technique are beyond the scope of this list of tips, briefly it works this way: In caucus, emphasizing confidentiality, you work with each party to develop “best case” and “worst case” scenarios, both in terms of dollar valuations and percentage likelihood of outcomes on motions for summary judgment, etc. These extremes will bracket reality. Generally, the

analysis will cause the parties' positional demands to move toward each other, sometimes quite substantially. Then, discuss with the parties, how they would like you to use the information you've developed (for example, by disclosing overlapping valuations or a mid-point). Helping the parties see the issues from the perspective of a timeline may also help to focus the discussion on the areas for which a monetary solution is appropriate. Considerations such as duration, frequency, and severity are important factors in developing a mutually understood valuation of the case.

15. **Precedents:** Sometimes, one party (typically an employer) will be concerned about setting a precedent. Some options to explore: a clause specifying the agreement's non-precedential nature; a confidential agreement; narrowing/isolating/removing a particular issue from the agreement; writing the agreement to make the case unique; reality-testing to see if a precedent is really such a big deal; contrasting the risk of no agreement.

16. Psychologists say that people tend to react negatively to any offer or information presented by an adversary ("**reactive devaluation**"). Couple this with "**selective perception**" (the tendency to screen out data which does not fit preconceived views) and you can see why disputants need mediators. You, as the trusted neutral, can carry exactly the same messages without the same negative burden. In practical terms this means you can introduce and reexamine ideas that the parties on their own have rejected.

17. **Impatience is always your enemy.** In fact, as you grow more experienced as a mediator and become more able to predict outcomes, impatience becomes an ever more subtle enemy. Be on guard.

18. The overall mediation should be a "**settlement event,**" meaning that everyone should develop the expectation that they've come to work on resolving the matter and that it *can* happen. During problem-solving, reinforce the psychology of the "settlement event" by keeping the momentum going, keeping things positive, reminding them of the time constraints, focusing them on the investment of their time thus far, and reinforcing the agreements so far. The parties will begin to believe a settlement should and will happen, which is powerful motivation for resolution.

## **THE 12 STEPS FOR AVOIDING IMPASSE**

1. Summarize where the parties were when negotiations began, where the parties are now, and the gap that still remains.
2. Ask the other side for more information that might help move things along (not necessarily what will close the deal--just enough to get over the immediate barrier).
3. Ask the other side what we (or I) need to do to get things moving again--and ask them to do the same.
4. Give it a rest. Disengage and come back to the problem later.
5. Consider changing negotiators.
6. Be up front about discussing each side's interests.
7. Purge emotions--emphasize respect for persons, empathize with the other side, agree without conceding, recognize the legitimacy of their interests.
8. Change the other side's BATNA--alter their expectations of alternatives to a negotiated agreement.
9. It's OK to make threats--BUT--they must be proportional, and they must be credible. Extreme or empty threats are counterproductive.
10. Change the deadline for agreement.
11. Do a risk analysis (e.g., a decision tree)--do it for yourself, and for the other side; do it with the other side.
12. Get a mediator.

## **5 QUESTIONS TO ASK YOURSELF (AND THE OTHER SIDE)**

1. Do you (or they) really need to "win" the lawsuit, or whatever the negotiation is about?
2. If the dispute is about money, what is the money for, and when?
3. Are we (or they) overlooking or sacrificing long-term interests for short-term interests?
4. Is my behavior appropriate to the type of negotiation I'm in?
5. What's going to happen tomorrow? Where are we going to be in this negotiation?