Dealing With Impasse

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This issue of the magazine is dedicated to exploring impasses. An impasse is a deadlock, a standstill, a dead end. The unstoppable force and the immovable object. The unwanted stalemate dreaded in anticipation and often dreadful upon arrival. Every dispute represents, at some point in the dispute’s life, an impasse. Similarly, deals hit dead points where forward movement looks unlikely. It is the impasse situation that brings clients to lawyers and disputants to mediators and arbitrators. What does the world of dispute resolution offer as answer to impasse scenarios?

John Lennon, in the song “Watching the Wheels,” said, “There’s no problem, only solutions.” The entire dispute resolution field can be characterized as many different paths leading to solutions to—or ways around or through—impasses. Some of those paths involve ways that parties to a dispute or a deal can find their own solutions despite a perceived impasse; other paths involve third-party decision makers finding a resolution for a dispute—in effect, a way around the parties’ impasse.

How do people in their lives overcome impasse?

Picture Nelson Mandela as he left his last prison cell where he had been incarcerated for 17 years. Mandela says that as he walked away from that cell, he realized that his anger for what had been inflicted on him could keep him imprisoned for the rest of his life, so he “let it go.” Mediators use various techniques to challenge parties to consider whether they want to “let it go”—reality testing, helping parties explore the costs of remaining deadlocked and the value of being released.

I recently witnessed a fight between two men on the subway in New York City. A large man sat down next to another rider, and, as he did so, he said, “Excuse me,” but he bumped the other man. The bumped rider was irate: “You can’t bump me and just get off the hook by saying ‘Excuse me.’” To illustrate what had happened, the bumped rider kept bumping the large man. Others on the train moved away, sensing a dangerous impasse. However, when the train stopped at 79th Street (my stop), the large man exited and said under his breath: “Maybe I’m the jerk. Could I be the jerk?” This ability to question oneself, to see the other side, is very rare in disputants. It is something mediators sometimes attempt—calling for a role reversal, or party perspective taking. Sometimes parties make a powerful shift and jump right out of a standstill, thanks to a good mediator.

When I experience a deadlock, often the best move is to do something else. For example, go running or work on an unrelated project. When I return to the deadlock, I am different. Time has passed. Things shift. Similarly, mediators use breaks, agenda control, and the passage of time to generate ways out of impasse.

Have you ever given up on a dispute? Wanted someone else to decide? Or the flip of a coin to determine the outcome? Arbitrators render valuable service by conducting a process that takes the decision away from the deadlock parties and doing so in a manner that is procedurally just. If the arbitrator can provide a fair and respectful forum, can listen thoughtfully to the evidence, can be even-handed and display impartiality, then the arbitrator’s award is most likely to be perceived as a just closure of the dispute, and the parties can more gracefully step around their impasse.

The Section of Dispute Resolution is working to improve the practice of both branches of the dispute resolution world: facilitation of parties’ decisions and decisional processes where third parties are requested to judge. Most recently, the Section hosted the first International Mediation Leadership Summit at the Peace Palace in The Hague. This event brought together 94 leaders in the mediation field from 28 countries around the world to share ideas and develop networks to improve the practice of mediation. From February 18 to 21 in San Francisco, the Section is hosting its Fourth Annual Arbitration Training Institute—a comprehensive training in commercial arbitration.

Please join the action! If you’re not already active in one of our 32 committees, or if you haven’t written for this magazine, or if you’re hesitating about whether to join our annual conference in April in New York City to share ideas and innovations with colleagues, do it now! Make your mark on this important field by participating, and take it up a notch! Eckhart Tolle, the author and spiritual leader, said, “There are no problems, only situations.” However, dealing effectively with situations—improving the practice of mediation, arbitration, and related processes—can either solidify or pierce the inevitable impasse that all disputing parties experience.

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Nearing the Finish Line: Dealing With Impasse in Commercial Mediation

By Dwight Golann

You are likely to experience a range of emotions in your work as a commercial mediator. At the outset, you will feel a real sense of pride: People with a difficult problem, advised by experienced lawyers, have selected you to help them resolve it. You will work hard to understand what is keeping the parties apart and can anticipate a real feeling of accomplishment at helping people solve a serious problem.

At some point, however—often during the late afternoon—you may find yourself silently wondering: How did I ever agree to become involved in this mess? This feeling arrives for me most often when the parties have stopped moving, not simply as a tactic or to consider a difficult decision, but in an apparent dead end. At that point, I am often out of ideas and low on energy.

This article describes techniques I have used to move deadlocked lawyers and clients toward agreement. They vary from simple options, such as challenging the parties, to others, such as parallel bargaining and postmediator proposals, which you may not have encountered. I will begin with relatively simple approaches, because they are my first resort, and then will describe more esoteric tactics to apply if straightforward efforts fail.

1. Persevere
The first suggestion is simple: Persevere. Many cases reach a point of apparent impasse, but it is only that—apparent. The disputants may be quite sincere, but the fact that a party has no intention of moving does not mean that it won’t do so later. Most cases reach impasse at some point. You never find out whether agreement is possible unless you push to find out.

In one dispute in which I served as mediator, a Silicon Valley executive had sued his company after being fired. I continued to work even after each attorney told me privately that the case could not settle. Finally, at 9 p.m., the parties reached agreement. As I went over the terms the defendant’s lawyer exclaimed, “They kept beating you up and you just kept going. You were like . . . like . . . the Energizer Bunny!”

At first, as a professional mediator, I found the idea of being compared to a drum-beating pink toy a bit demeaning. But as I thought more about it, the comparison was apt. A commercial mediator’s job is to keep advocating settlement until the parties tell him unequivocally to stop, and he sees no plausible way to change their minds.

2. Restart the Bargaining
Ask About Interests, for a Limited Time
The next suggestion is to try something that mediators are taught to do as a matter of course—probe for interest-based options. Stimulating interest-based bargaining is difficult in commercial mediation, however. Businesses, unlike warring neighbors, can usually find a new partner, and by the time mediation occurs have often done so. Mediators who pursue interest-based options, especially a relationship repair, are often rebuffed (“If you knew them like we do, you’d understand that the idea of letting them back into our operation is out of the question!”) Later, however, the same parties are sometimes more open to creative ideas, if only because their preferred option, a simple money deal, is not available.

If discussing interests leads to a settlement, you are in luck. Keep in mind, however, that changing the subject can be helpful even when it yields no tangible result. Simply thinking for a few minutes about something other than the other side’s obstinacy gives disputants a psychological breather, making them more flexible when they return to money bargaining. Someone who had earlier vowed to go no further may now be willing to do just that because a break allows him to change course with less feeling of contradicting himself.

Commercial mediation is typically scheduled for only a single day, however, which creates time constraints on inventive bargaining. If parties spend hours looking at other options but hit a dead end, they often have little time or energy left to work out an agreement over money. To avoid this I may set a time limit (which can always be extended) on consideration of creative options.

As an example, consider this dispute. A condominium association sued several contractors over a leaking roof, demanding that the roof be entirely replaced at a cost of $1.3 million. In mediation, six defendants argued vehemently that the roof could be repaired for no more than $300,000.

Hearing this, I said to the defendants: “I suggest we think about whether you as a group can agree to repair and guarantee the roof. From what you tell me, that might be a much lower-cost option. I’m aware, though, that Nancy has to leave for the airport at 4 p.m., and she holds the largest checkbook. So I suggest we explore the repair option for the next hour and a half. If it doesn’t work we can go back to put-
The defendants talked cooperatively for 90 minutes, but the initiative soured over their unwillingness to guarantee the repair for 10 years. We returned to talking about money—and within an hour the group raised its offer from $200,000 to $700,000. A month later the case settled at $1.1 million.

Push for Linked Moves

As this example demonstrates, when creative discussions are not successful, the other option is to continue pure-money bargaining. Parties are often more willing to make monetary concessions if they know what they will get in return. Mediators can provide this information by proposing some of the following linked moves.

“What if?” The simplest way to feel out parties about reciprocal concessions is to ask “What if?”; as in, “What if I could get them to come down $200,000 . . . if I could get that much movement, could you make a deal at that point?” Or, “Let’s say I could get them to drop that far—what do you think you could do in response?” The “what if” phrasing suggests that the other side is resisting the idea of conceding, reducing the listener’s tendency to devalue the potential concession. It also suggests that the adversary will have to make a concession first, satisfying a positional bargainer’s wish to have its adversary “sweat for a deal.”

Simultaneous steps. Another approach is to ask both sides to make concessions simultaneously (“I’m going to ask you to drop 200, and at the same time I’ll ask the defendant to go up 150”). This plays on the human wish for reciprocity: Each party knows that it will not have to compromise to get that much movement, could you make a deal at that point?"

Range bargaining. A variant on this is range bargaining. Here the mediator proposes that future bargaining will occur within a stated range of numbers. If parties are at, say, $80,000 and $200,000, a mediator might say, “Can we agree that we will bargain from this point on between 120 and 150?” This is the practical equivalent of parties making simultaneous jumps, but it is sometimes psychologically easier for litigants to accept, because each side can tell itself that it has agreed only to go as far as the specific number and that most of the concessions from that point on will have to be made by the other.

Parallel-track bargaining. Parties are sometimes willing to indicate privately that they will compromise, but will not do so “publicly” to their opponent. The result can be a frustrating standoff in which neither side is willing to be the first to make a serious concession. One way to deal with this is by conducting “hypothetical,” or “parallel-track” bargaining.

For example, suppose a plaintiff is at $3.5 million and a defendant at $500,000. The defendant admits privately to you that it is willing to “go to the very low seven figures” to settle, but it won’t do so until the plaintiff gets to a “reasonable” position, and, it says, $3.5 million is not it. You respond by asking, “What would you consider reasonable at this stage, given that you are at 500?” The defendant answers, “No more than $2 million.” You then say, “Assume for a moment that the plaintiff is at $2 million. What offer would you be willing to make then?” The defendant answers “Then I’d go to 700.”

Now you ask the plaintiff the same questions: What would be a reasonable stance for the defendant to take at this point? (Say the answer is “$1 million.”) How much would you come down if the defendant got to $1 million? (“$2.5 million.”) The result is that you now have the defendant at $700,000 and the plaintiff at $2.5 million (admittedly, based on different assumptions about the bargaining situation)

You can then repeat the process, asking the defendant, “What would you expect the plaintiff to do in response to your $700K?” (“1.5 million”) “What would you do if they did go there? (“850K”) You can then pose the same questions to the plaintiff. Gradually, the parties will approach each other.

Lawyers are at first wary of parallel bargaining because it calls for them to make a concession without having actually received one from the other side. But they understand that the other party is working under the same ground rules, and if you seem confident about what you

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are doing, they will often cooperate. As a result, parties can come quite close to each other without knowing it. At that point, you can ask each for permission to reveal its most recent offer and the assumption on which it was based, provided that the other side does so. Alternatively, you can use the information to support other approaches, such as a mediator’s proposal.

Make a Special Plea

Personal request. If linked moves are not successful, you can sometimes obtain a concession by asking for it explicitly. Frame it as a personal request: “If you could make one more move to help break this deadlock, I’d appreciate it. I would tell the defense that you had been adamant, and 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 because it appears to be a one-time move rather than the start down a slippery slope. This means, however, that the tactic will only work once or twice in a single mediation; repeated requests are likely to be met with, “Why don’t you ask them to be reasonable for a change?”

Final move. Parties will often agree to make an extra effort if they know that it is the last you will ask them to make and not simply a prelude to further compromise: “I’m going to ask you to go to $1.1 million. That’s my last request. If this doesn’t work, it’s over, and I’ll tell the plaintiff that. I won’t come back to you again.”

This is a risky strategy because you cannot go back on your word—if you say that you will not come back for more, you can’t unless something truly unexpected happens. But a last-and-final plea will often produce an additional concession.

3. Ask for Help, and Wait

This suggestion should follow “persevere,” but I have delayed it because turning the initiative over to others seems counterintuitive to those of us who are active problem solvers. I have found that when parties are stuck, one good option is to summarize the situation calmly and sympathetically, and then wait silently for a few moments. Ask the disputants for ideas, and then observe how they respond. I have found, surprisingly, that when I do this, disputants often take the initiative. Even when they don’t, sitting back for a moment gives me a minibreak; I learn something from their reaction, and can use the pause to think about other options.

4. Change the Process

Modify the Mix or Structure

Changing the participants or the structure will sometimes restart the process. The simplest is to experiment with the format. If caucusing is not working, would another format be more effective? Options include:

- Disputants meet together
- Key decision makers meet apart (“only you can do this . . .”)
- Experts or lawyers meet (“professionals confer”)
- One person meets the opposing team (“into the lion’s den”)
- Participants meet in an informal setting
- People are added to or subtracted from the process

Any of these variations can unfreeze the process enough for parties to resume bargaining, and in unusual circumstances may resolve the controversy entirely.

Disputants meet together. In this option, all the disputants are convened in what amounts to a new joint session (assuming, as is usually true in commercial mediation, that they have adjourned to separate caucus rooms). The purpose is not for each side to reargue its case. There may be a single issue that can be illuminated by a direct discussion.

Alternatively, you can assemble the disputants to deliver a message; for example, that the process is in peril and that you plan to ask each of them for a special effort to avoid a breakdown. You could, of course, deliver the same message separately to each side, but calling a special meeting and saying it to everyone together makes it clear that the problem is real, and no one is being singled out for blame. Laying out a situation in this way can also serve as a springboard for challenging disputants to come up with ideas, either together or in caucuses—a version of “Ask for Help, and Wait.”

Key decision makers only. In commercial disputes, there is often a key decision maker for each party team. One option is to bring them together for a private conversation. The dynamic in these private meetings is often strikingly different than when adverse groups talk with each other. A direct meeting is likely to seem familiar and informal, much like a meeting outside litigation.

Disputants chat, talk informally, and present at least an air of cooperation, particularly if they had a good relationship in the past. Lawyers often ask the mediator to be present at such meetings to ensure that the discussion remains on a productive level or guarantee confidentiality, but principals can also meet alone.

Mediator Eric Green calls this the “Napoleon gambit” because he often adds an implied message to the process: “Only you have the wisdom, breadth of vision, authority, and decisiveness to end this conflict. This case is a difficult one, but you can . . . .” Disputants with sizable egos are likely to rise to the challenge and take it as a personal goal to achieve a deal.

For example, a manufacturer was in a dispute with its insurer over the insurer’s refusal to pay huge claims arising from a mass-tort class action. The parties agreed to go to mediation. The insurer’s CEO prepped intensively for the process, planning to have a point-by-point discussion of policy coverage and other issues with representatives of the manufacturer.

When the parties convened in joint session and the insurer CEO tried to discuss the case, however, the manufacturer’s inside counsel said that he wasn’t interested. He had listened carefully to his litigation
In one such situation, a franchisor and franchisee were in a dispute over the franchisor’s alleged inability to deliver services and the franchisee’s failure to pay a $60,000 quarterly fee. It became clear that any settlement would require continuing the franchise relationship. The franchisor, however, would not consider this, arguing that the franchisee was a deadbeat who had made up his allegations simply to avoid paying the fee. Asked about this, the lawyer for the franchisee explained that his client had been planning to make the payment and had only withheld it because the attorney told him to do so.

I knew that the opposing lawyers in the case respected each other, and so I asked the franchisee and his attorney if the lawyer would be willing to go into the franchisor’s caucus room to explain why the payment had not been made. I suggested that the lawyer go in alone, so there would be less suspicion that he was simply protecting his client.

The lawyer went into the other caucus and explained that the franchisee had acted on his instructions. After talking privately, the franchisor team told me that they thought the franchisee had gotten bad legal advice, but were less concerned about his good faith and were willing to consider rest the franchise.

Meet in an informal setting. Sometimes the key to breaking an impasse is to change the physical setting. Most commercial mediators work in conference rooms, but at times other settings can be effective because they make participants more comfortable or have positive connotations.

This approach worked in the following case. A doctor sued a high-tech company, arguing that it had illegally diluted his interest in the company by issuing stock to new investors without his permission. There seemed to be a very personal element in the case: The doctor felt that he had played a crucial role in sponsoring the start-up and that its young CEO, a friend of his daughter, had betrayed his trust. Settlement discussions reached an impasse, and we adjourned.

With the defense’s assent, I suggested visiting the doctor at his home before work one day. He beamed as he showed me his porcelain collection and mementos of his medical achievements while his wife watched. Talking over coffee and grapefruit, the doctor talked about the dispute in a much more relaxed way, and a few days later we had a settlement.

Add or subtract people. It is sometimes useful to change the mix by adding people or taking them out of the process. It is usually easier to add players than subtract them; suggesting that a participant leave is often interpreted as a judgment that he is being unreasonable or, if made by an opponent, as an effort to “push us around.” It is sometimes possible to eliminate a problem player indirectly, however, by (for example) suggesting that both sides bring in someone from a higher level: “Perhaps if we could get the plaintiff to bring in its CFO and you did too, we could explain your thinking on damages . . . . ”

Offer an Assessment

At this point in the process, the participants should have enough trust in you, and enough frustration with the results of their approach to the conflict, to accept advice. Consider offering some, or sharpening advice that you have already given. Opinions can cover at least three separate topics:

- What offer to make next
- Whether particular settlement terms satisfy a disputant’s broader interests
- The likely outcome if the case is adjudicated

The first option is to offer advice about the bargaining situation—what is necessary to move the process forward. This is the least risky opinion to offer because you are unlikely to be blamed even if your advice is unwelcome: You are simply confirming, after all, what the listener has known from the outset—that its adversary is unreason-
able. Parties may still refuse to move, however, complaining (for example) that “It’s time for them to get realistic!” If so, you can sometimes jump-start the bargaining by suggesting linked moves as described above.

Another option is to offer an opinion about the value of an offer, either in terms of a party’s broader interests (“Given what you’ve told me about wanting to put this behind you . . .”) or the party’s litigation alternative (“In light of what I know of Judge Jones’s attitude toward discrimination cases . . .”).

Before evaluating the litigation outcome, however, focus on the cost of continuing the litigation. Parties may not welcome a reminder of how much it will cost to achieve “justice,” but they should by this point in the mediation be willing to take account of it. If drawing attention to costs is not enough, and you have not yet given either side a “hard” evaluation of the legal merits, this may be the time to do so.

How to evaluate effectively is a topic in itself. Briefly, however, the key is not to give your personal opinion of who is likely to win (which, after all, is irrelevant because you will never decide the case). Rather, think of yourself as a legal meteorologist, forecasting the weather in a future courtroom. You may predict a 70 percent chance of bad weather, but it is not because you personally prefer rain—it’s simply the way you read the evidentiary barometer. You can:

• Evaluate more of the case, for example, going past stating a view about a single issue to give an opinion about a party’s overall chance of winning.

• Make an opinion more definite, by replacing a characterization such as “you’ll have difficulty winning on liability” with “Given Judge Smith’s rulings in IP cases, I think you have a 30 to 40 percent likelihood of prevailing on liability at trial.”

• Set a specific monetary value on the case (“probably a $150,000 to $200,000 case, in this county”).

• Make your evaluation more forceful by putting it in writing, but be careful about embarrassing a participant.

5. Manage the End Game

Play “Confidential Listener”

Toward the end of a process, you can probe for the parties’ bottom lines. One way to do this is to play “confidential listener.” This involves asking each side privately how far it will go to get an agreement, then giving all parties a verbal characterization of the gap. This allows parties to give the mediator and each other a signal about their willingness to compromise, without having to make a specific concession. Effectively applied, the confidential listener tactic can give both you and the disputants a clearer sense of each side’s actual goal.

Don’t ask disputants for their last-and-final number. Parties almost never give it, and such requests put them under pressure to mislead you. Worse yet, if a party does answer sincerely, it may feel that it has to stick with the number for the sake of consistency, even if later it becomes willing to stretch further. You are likely to get more candid answers if the parties fear failure from seriously gaming the process. It makes sense, therefore, to wait until disputants are close to impasse and to characterize the technique as one of the last things you can do to find a solution. I would introduce the option in this way:

Your offers are a million dollars apart, but I think you are in fact much closer than that. Let me try something I call “confidential listener.” I’ll ask each of you to give me what I’ll call your “next-to-last number”—a number one step away from the lowest you’d accept or the most you’d pay to settle this case.

I won’t reveal either side’s number to the other, or give you a number answer on how far apart you are; if I did that, each side could calculate what the other party’s number was. Instead I’ll call the lawyers together and give a verbal statement of how far apart you are, such as “very close” or “far apart.” That keeps anyone from being locked in. I’ll be back in a few minutes to ask for your number.

Once you have gotten the parties’ numbers, you can give them a characterization of the gap between them. For example:

• “The gap is substantial, but I think it can be bridged.”

• “You are closer than the cost for each of you to litigate this case through trial, so it’s worth continuing to talk.”

• “You are very far apart. Unless a party changes its view of what the case is worth in court, it’ll be hard for you to agree. Should we consider getting an expert opinion?”

After giving verbal feedback you have an additional option, which is to ask each side for permission to reveal its number to the other on a mutual basis: “I’m going to ask both sides if you would agree to let me disclose your number to the other side, on the condition that they authorize me to tell you theirs.”

Offer a Mediator’s Proposal

Under a mediator’s proposal, the neutral suggests a set of terms to both parties to which they must respond under the following ground rules:

• Each litigant must tell you privately whether or not he or she would agree to the proposal, assuming that the other side has done so as well.

• The terms must be accepted or rejected unconditionally; in other words, no “nibbling.” For example, “We’ll accept, but the warranty has to be three years, not two” would be treated as a rejection.

• Each side must answer, but without knowing the other’s reply. If a party rejects a proposal, it will never learn whether its opponent would have accepted it.

• Usually, each side will answer within 5 to 20 minutes. However, if accepting would require a party to go beyond its authority, you may need to set a response deadline for the next day or several days later. If one side asks for repeated extensions, there is sometimes a
problem: It becomes apparent that the other side has said yes—otherwise why would you extend the process?

Parties thus know that they may be able to achieve complete peace by saying yes to a mediator’s proposal, but that if the effort fails, the other side will never learn of its willingness to compromise, and its bargaining position will not be impaired. My practice is usually to require both sides to answer even if one side quickly rejects the proposal; my thinking is, first, that these are the ground rules, and second, that it is useful for parties at impasse to think hard about how far they will go to get a deal.

Many mediators avoid this technique, perhaps because it involves presenting terms on a take-it-or-leave-it basis and thus taking over the bargaining process. My sense, however, is that parties often reach a point at which they want me to take over responsibility. Doing so relieves them of the “water torture” of positional bargaining, in which they have to make one painful concession after another without knowing whether it will get them a deal. It also allows parties that expect to be second-guessed by outsiders to use the mediator as a convenient scapegoat: “This lousy compromise wasn’t our idea, it was the mediator’s.” I find that mediator’s proposals are accepted by both sides at least two-thirds of the time.

If you decide to make a proposal, how should you decide what the terms will be? My proposals do not reflect an evaluation of the parties’ legal cases, and I tell them that. Doing so also reduces the risk that a party will feel that I have ruled against them on the merits. I am likely to say:

In framing the proposal my goal is not to please either side. I could suggest terms that you would be very happy with, but it would be a waste of time because the other side would reject them. For the same reason, I can guarantee that my proposal won’t make them happy either. I’m afraid that we’re at the point where any proposal has to balance the pain each side will feel in accepting it. My goal is to find a set of terms that both parties will decide, however reluctantly, is better for them than litigating the case through trial.

If a proposal fails. Assume that the parties have rejected your mediator’s proposal. Is this the end of the road? No. You can ask the rejecting party to take the initiative: “I understand that you can’t accept my proposal, but what do you need to make it minimally acceptable?” Parties usually reply by giving a new number that often falls between your proposal and their last offer: “We won’t go to 500, but we could go to 400.” You can then ask to present the party’s new number to the other side: “Can I tell them that you’d settle if they would go there?” Often a party that had refused to make any further concessions will now agree to put forth a new offer.

It may seem strange that a party would offer compromises beyond its announced bottom line. This may be due to what is called the “contrast principle”: A further concession may look good, compared to the “unacceptable” proposal you have made. Or it may be that a party that has rejected a proposal feels that it should make a gesture to preserve its relationship with the mediator. Or the fact that the other side has rejected a mediator’s proposal may convince a party that it must go the “last mile” or face failure. Whatever the motivation, the failure of a mediator’s proposal often sets the stage for new offers that had been unavailable before.

Successive proposals. It is sometimes possible to make two mediator’s proposals.

As an example, suppose a plaintiff is adamant that the defendant, if pushed hard enough, will pay $150,000 to settle a case. You privately think that the defendant will reject that number, but the plaintiff believes that it will, and as long as it does will not consider settling for less. You therefore make a proposal to both sides at 150. The plaintiff accepts, but the defendant immediately turns it down.

You can then meet with the plaintiff team and say, “I made the proposal at 150, to hold their feet to the fire and see if they were bluffing. But they’ve turned it down flatly. They just won’t go there. I think we now have to consider a different strategy. I’m willing to keep looking for a deal, or even make another proposal, but it’d have to be at a lower number. Sticking with 150 would just be beating our heads against a wall. What do you think we should do?”

Challenge the Parties

If all these techniques fail, you can once again challenge the parties to take the initiative. Simply asking the parties for ideas as described above is a gentle challenge, but you can also pose a question more bluntly: “It looks like we have a real problem here. We may be at the end of the road. What do you want to do next?” And wait.

Adjourn and Pursue

Mediation often requires parties to accept deals much worse than they had expected going into the process, and litigants sometimes cannot quickly adjust to the resulting feelings of loss. Even when emotions do not block a decision, there may be other problems. A party may not have enough authority to settle, or may feel the need to confer with a constituency to shield itself from after-the-fact criticism. Some forms of mediation occur over a series of sessions, which provide breaks to deal with such issues. Commercial mediations, however, are typically scheduled for a concentrated time period, usually a single day, which leaves little time for adjustment and consultation.

Adjournment, of course, carries dangers. Parties make difficult concessions in part because they hope to achieve peace. Once they leave, there is a risk that they will become discouraged or decide that they have gone too far. In practice, however, this does not seem to happen; I have rarely seen a commercial mediation fall apart because of an adjournment. If there is failure, it is usually because an impasse that existed at mediation cannot be overcome, not because anyone backpedaled or gave up.

Indeed, commercial mediations increasingly seem to
require more than a single day. When the process cannot be completed within the originally scheduled time, you still have options.

Arrange status calls. The easiest option is to ask lawyers to participate in a status call: “Let’s agree that I'll call each of the lawyers on Wednesday morning to talk about next steps.” Agreeing to status call does not commit people to make decisions or guarantee an interactive process, but it does give you a chance to gather information and then propose a structure for further discussions.

I find that it is almost always better to talk with each side privately, rather than have a joint call. A private call permits disputants to give more honest information about obstacles and to signal flexibility without hurting their bargaining position. The key point is to create a time frame and expectation of further discussion.

Schedule another meeting. The next option is to set up another meeting. Before suggesting one, ask yourself these questions:

- Are all of the parties ready to move forward? Does a litigant need more time to calm down, or do the parties need to do additional investigation?
- If there is another meeting, how should it be structured? In particular, can the process be set up in a way that makes it less likely that it will simply repeat the last session?
- I often make some of the following points when proposing another meeting:
  - Because each side has already argued its case, it will not be necessary to hold a second opening session. (This is usually greeted with expressions of relief.) It may make sense, however, for the parties to meet jointly for a specific purpose, such as to hear a defendant’s critique of the plaintiff's damage analysis.
  - There is usually no need to commit to another full day. Indeed, doing so may give the signal that the parties are still far from a settlement and should wait to make their final concessions. Given the progress made so far, two to four hours should be enough for a follow-up session. I often suggest that we agree to meet after lunch, or to go only until noon. Setting a short time frame does not mean that the process cannot continue longer, and often it does. Doing so does signal that the process is moving toward closure and that disputants should come prepared to make hard decisions.
  - I may go further, emphasizing that it is time to “cut to the chase” and that I expect everyone to be ready to make final decisions at the session.

Use telephone and email diplomacy. Often it is not possible to schedule another meeting quickly. Disputants may have flown in for the first meeting and are not willing to return for another one or need time to confer or gather data. Luckily, there is usually less need to meet in person a second time because you have developed a working relationship with the disputants. Once a session has been held, it is much easier to carry on follow-up discussions by telephone or email.

Electronic communication has disadvantages, of course. Over the telephone, participants cannot see each other's body language, and with email, they cannot hear each other’s voices. With email, in particular, there is a danger that messages will seem harsh because they are in writing and have no body language or tone of voice to soften their impact. The biggest disadvantage of electronic communication may be the loss of focus and continuity—people drop a case and then pick it up again, often reading a message or taking a call when they are distracted by other matters.

Conduct a time-block telephone session. One way to inject focus into a process conducted electronically is to set up “time-block mediation.” In this format, disputants agree that during a certain time period, say from 2:00 to 5:00 p.m. one afternoon, all the attorneys and decision makers will be at a telephone or computer, ready to receive a call or email from you. They may work on other matters but will interrupt them to respond to your calls or messages. You can then conduct shuttle diplomacy. The advantages of time-block mediation are that it is less subject to interruption, and the time limit motivates the parties to make hard choices.

Pursue them. Remember that one of the traits lawyers report that they most value about mediators is persistence. The time to follow up and willingness to plug on may be a key advantage that a new mediator has over “star neutrals” who go on to a new case every day. Even if the parties do not agree to a follow-up process, call the lawyers on your own initiative within a few days of an unsuccessful session to ask their thoughts and sound them out about next steps. Almost no attorney resents such a call.

Remember that you are the guardian of optimism about the process. Disputants tend to assume the worst, and look to you for signals about whether it is worth continuing. Unless you have no realistic hope for the process, keep a positive tone.

Set a final deadline. The only thing that will motivate some people to make difficult decisions is a firm deadline. You can create one by setting a time at which you will declare the mediation over and stop acting as mediator. The parties can continue to negotiate alone, of course, but the implicit message is, “If you have not been able to reach agreement with assistance, why should you think you will be able to do so by yourselves? And if you don’t settle, is your litigation alternative really as rosy as you have been claiming?”

A polite warning that you will end the process can cut through posturing and put pressure on the parties to make additional efforts. To avoid making disputants feel that you are pushing them around, stress that you are not setting the deadline to coerce anyone but simply are recognizing the reality of the situation—at some point everyone has to make decisions and move on.

Apparent impasses in commercial mediation are nearly inevitable, but they need not be final. With these and other techniques—and persistence—you can bring even the most stubborn cases to closure. ✗
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 oars 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.

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
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 causces 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 called for and how he or she thinks things will play out if that move is made. After listening, we can describe what we have seen happen in similar situations and explain why, given our experience or what we know about the other parties, following that particular course might have the same consequences in the case at bar.

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.

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 mediations 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. 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 been intimidated 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 counsel 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

(continued on page 28)
Although participants in mediation may have many goals, in most business disputes—including employment and labor-management disputes—the primary reason why parties choose to go to mediation is the hope of achieving a mutually acceptable settlement. Accordingly, the primary goal of the mediator is typically viewed as assisting the parties to reach settlement.

A 2007 article by U.S. Magistrate Judge Wayne Brazil suggests, however, that achieving settlement should not be viewed as the mediator’s primary goal.

In the first place, according to Brazil, the mediator who views his primary goal as that of “getting the case settled” suffers from an exaggerated view of both his ability and responsibility. Brazil states:

No . . . mediator ever settled a case. Neutrals don’t make the binding commitments that constitute the settlement agreement; they don’t become parties to the settlement contract. Parties, and only parties, settle cases . . . .

We must avoid teasing or torturing ourselves with the . . . vanity-based illusion that if we are good enough, we can pull off some minor psychological miracle and engineer the best possible outcome by manipulating the parties past their own barriers and baggage into a deal that they are incapable of accessing on their own . . . . I am deeply skeptical that there are tricks or manipulations whose use is essential to being effective as a mediator, even if one defines “effectiveness” in the narrow sense of getting the parties to agree to a deal.1

A mediator’s belief that he has the ability and responsibility to “get the case settled,” Brazil states, has several harmful consequences. First, it leads the mediator to assess the quality of his work by whether or not the case settled. One risk of that view is:

If we slip into thinking that we have the responsibility [to get a settlement] when, in fact, we do not have the power [to do so], we are courting falsely-premised feelings of failure and early burnout.2

Brazil continues:

Assuming responsibility to get the case settled also is dangerous because it can pressure us to elevate ends over

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means. It can tempt us to cut process corners, brush past real ethical dilemmas, and resort to pressure or manipulation to bridge gaps and close deals . . .

An exaggerated sense of responsibility for the outcome of negotiations is deeply inconsistent with two of the animating purposes of mediation: to empower the parties and to honor and facilitate their self-determination. There is considerable risk that a mediator who feels that his primary mission is to get the case settled . . . will be tempted, in order to push the parties to change their settlement positions, to color or distort the views that he expresses to them about the merits of the matter and what settlement terms might be offered or accepted.3

Because Brazil perceives the integrity of the mediation process to be threatened if the mediator’s primary goal is to obtain a settlement, he asserts that, at least in court-sponsored mediation, the mediator’s primary goal should be to ensure the integrity of the mediation process. This goal, Brazil concludes, can be achieved if the mediator encourages trust, is genuine, intellectually honest, transparent, and inclusive in process decisions.

While we do not disagree with the value of these behaviors as means of furthering the integrity of the mediation process, we are troubled by Brazil’s view that the integrity of mediation is jeopardized if the mediator’s primary goal is to obtain a settlement. To be sure, Brazil posits this view only in the court-sponsored mediation with which he is concerned. Still, if his analysis is sound, and a primary focus on settlement threatens the integrity of the mediation process, that threat would appear to exist equally in “private” mediation—that which takes place outside of court-sponsored programs. And, since the participants in most private mediation view settlement as their primary goal, a conclusion that the pursuit of that goal by the mediator threatens the integrity of the mediation process would present a major problem for the mediation process. Thus, Brazil concludes, can be achieved if the mediator encourages trust, is genuine, intellectually honest, transparent, and inclusive in process decisions.

Before doing so, we should note that Brazil suggests that his concerns about process integrity may not be as applicable in a purely private setting as in court-sponsored mediation:

When the parties are primarily economic actors . . . and when they agree to pay a mediator $10,000 a day (or more), they are likely to have one overriding goal: to get the case settled. They are paying for mediation, at least in part, because they have tired of paying for litigation. Given the dominance of the goal of getting the case settled, and the thickness of “process skin” that big-time economic actors are presumed to acquire, it would not be surprising if the parties to mediation in these kinds of cases were much more concerned about ends than means and were not inclined to worry a great deal about abstract purity of process. In short, they are not likely to mind a little “process roughness” if they sense that it increases the odds that they will get a deal.4

We think that this effort to separate private mediation from court-sponsored mediation is, at best, only partly accurate. In the first place, as Brazil recognizes, not all private mediation consists of “big-time economic actors” paying a mediator $10,000 a day. To the contrary, the issues and the economic stakes in much private mediation, including mediation that takes place in the business/commercial arena, do not differ substantially from the issues and economic stakes in much court-sponsored mediation. Furthermore, we have both mediated the type of “high-stakes” cases that Brazil describes. Although it is undoubtedly true that in such cases the parties expect some pressure from the mediator to settle, we have never understood or contemplated that the parties anticipated or would accept our engaging in the type of conduct Brazil describes—“cut[ting] process corners, brush[ing] past real ethical dilemmas, and resort[ing] to manipulation to bridge gaps and close deals.” Much less have we understood that we were free to “color or distort the views that [we] express[ed] to them about the merits of the matter and what settlement terms might be offered or accepted.” Hence, we think that if the concerns expressed by Brazil about the integrity of the mediation process when the mediator’s primary goal is settlement are valid, they are as valid in private mediation as in court-sponsored mediation.

One can hardly deny that the mediator who is intent on achieving settlement might seek to manipulate the parties in the manner described by Brazil—he or she can color or distort the views expressed to the parties about the merits of the matter. For example, the mediator who believes that one of the parties has the weaker legal position, and hence is unlikely to prevail in the event of a trial, might overstate to one of the parties his or her view of the weakness of that party’s position, hoping that by doing so, he or she will persuade that party to accept the settlement terms offered by the other party. (The mediator who does so might rationalize the conduct on the grounds that he or she is saving the weaker party from defeat in court.) A variant of this behavior is when the mediator encourages both parties to believe that their legal positions are weak, hoping thereby to move each of them sufficiently close to the settlement position of the other so that agreement can be reached. (This behavior,

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too, can be rationalized on the ground that it will save both parties the costs of trial.

However, we do not think that the risk of this type of manipulative behavior by the mediator necessarily leads to the conclusion that the mediator’s goal should be limited to ensuring the integrity of the mediation process and should not also include achieving settlement. In addition to the facilitative functions, mediators can help parties reach settlement—assisting each party to think about its underlying interests and how those interests might be met by alternative terms, coaching the parties’ negotiations, and avoiding the pitfalls of reactive devaluation by “owning” a party’s proposal. There are other plainly ethical techniques a mediator can employ to help the parties reach settlement.

For example, in the face of a seemingly unbridgeable gap between the parties, the mediator, who may have a good sense of where the parties will have to be if the case is to settle, can say, “If I could ever get the other side to X, would that be an impossible place for you to get to?” Or, “If they offered Y, would you reject it?” There is also the technique of the mediator’s proposal, in which the mediator, with the parties’ permission, proposes a resolution, and each side tells the mediator in confidence whether or not it could accept that proposal. If both sides respond in the affirmative, a settlement has been achieved. If either responds in the negative, there is no settlement, and the party responding in the negative does not know whether the other side has accepted or rejected the proposal. Finally, the mediator can reduce the risk that the parties will not reach an agreement that both would regard as superior to the “no-agreement” alternative by simple persistence—by encouraging the parties to continue to search for settlement ideas at the mediation session or through follow-up thereafter, even after one or both are convinced that settlement has been achieved. If either responds in the negative, there is no settlement, and the party responding in the negative does not know whether the other side has accepted or rejected the proposal. Finally, the mediator can reduce the risk that the parties will not reach an agreement that both would regard as superior to the “no-agreement” alternative by simple persistence—by encouraging the parties to continue to search for settlement ideas at the mediation session or through follow-up thereafter, even after one or both are convinced that agreement is unlikely, if not impossible.

In sum, the availability of noncoercive mediator techniques such as those described above suggests an important role for the mediator that goes beyond simply ensuring the integrity of the mediation process. The mediator can, without impinging on the integrity of the mediation process, use any or all of these techniques to assist disputing parties to achieve the goal of settling the dispute.

We also think that there are powerful external checks on what Brazil describes as the temptation to “cut corners, brush past real ethical dilemmas, and resort to pressure or manipulation to bridge gaps and close deals.” One external check is a result of the fact that many of the most active mediators in the business/commercial arena are associated with provider organizations. In 2006, for example, JAMS provided mediators in more than 8,200 commercial disputes, and the American Arbitration Association provided mediators in more than 73,000 cases. A smaller organization that functions solely in the labor-management area, Mediation Research & Education Project (MREP) has provided mediators in more than 3,500 cases in the last 25 years. Each of these organizations is aware that unethical behavior by any of its mediators could lead to the destruction of the entire organization. Thus, each discourages excess pressure or other inappropriate conduct in an effort to obtain settlement. The MREP Mediator Guide, for example, states:

A difficult question is the extent to which the mediator should attempt to push a party into a settlement that it is reluctant to enter into. Some pressure from the mediator may be crucial in moving the parties out of their existing deadlock and towards settlement. On the other hand, if an employer or union is pressured by the mediator into entering into a settlement that it subsequently views as unwise, it may be reluctant to mediate in the future. I would resolve this conflict by stating the mediator’s role as follows:

The role of the mediator is not to persuade either party to enter into a settlement that it views as contrary to its best interests. Rather, the mediator’s role is to assist the parties in exploring what their interests are, and how a particular resolution of the grievance would affect those interests. The mediator may encourage a party to think about interests that are not apparent to that party, and to think about how a variety of possible settlements would impact upon those interests. The mediator is also free to state his/her view as to the desirability of a particular settlement. If, however, despite the mediator’s advice, a party views a particular settlement as contrary to its interests, the mediator should not bring pressure to bear on that party to accept the settlement. The ultimate decision on whether to accept a particular settlement must be for the parties themselves. This decision should be free of pressure, albeit not free of advice, from the mediator.

JAMS instructs its mediators that:

The right of the parties to reach a voluntary agreement is central to the mediation process. Consequently, a media-
tor should act and conduct the process in ways that maximize its voluntariness.9

The Standards of Conduct for Mediators provided by the American Arbitration Association, and which are followed by many other mediator provider organizations, state:

1. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media, or others.10

Even the mediator who is not affiliated with a provider organization, or whose quest for a higher settlement rate is unchecked by ethical pronouncements, should be held in check by the realization that unethical behavior—whether or not it leads to settlement—is likely to be fatal to his or her career. Our research on why disputing parties would never again use a particular mediator showed that the most common reason, reported by 48 percent (46 out of 96) of the respondents, was that the mediator lacked integrity.11

The comments on such mediators included the following:

I had one mediator . . . disclose information provided in confidence . . . . Once it surfaced that the mediator had breached confidence, clients and lawyer were outraged and mediation failed.

Dishonesty in reporting the other side’s position—confirmed later in conversation with counsel.

I’ve had mediators come in and say to both sides that their case stinks. No credibility there.

A bad characteristic of a mediator that I have experienced is the “settlement at all costs” mentality. I have had a mediator push me to settle a matter at an excessive cost . . . . This shows too much adherence by the mediator to the notion that his or her success is measured by whether the case settles or not.12

Finally, to the extent that the mediator is tempted to engage in ethically dubious conduct designed to bring about a settlement because of his internal conviction that if the parties do not settle he has failed as a mediator, the sound counsel of Brazil should serve as a counterweight:

No . . . mediator ever settled a case. Neutrals don’t make the binding commitments that constitute the settlement agreement; they don’t become parties to the settlement contract. Parties, and only parties, settle cases.

On this score, Brazil is correct. The mediator cannot settle a case. All that the mediator can do is to assist the parties to overcome those barriers to settlement that flow from emotion, faulty communication, failure to accurately identify their interests and priorities, failure to accurately identify their BATNA, and so forth. Brazil describes this behavior as assisting the parties to reduce the risk of false negotiation failure. The mediator who fully understands this—that even though his goal is to bring about a settlement, ultimately the most he can do is to avoid a false negotiation failure—may be disappointed that the dispute has not been resolved, but will not equate a lack of settlement with failure and will not be tempted to cut ethical corners to obtain settlement.

In conclusion, we think that the mediator’s pursuit of settlement as the primary goal poses no substantial threat to the integrity of mediation if the mediator understands two key points. First, the ability to bring about a settlement is limited by the self-determination of the parties and ultimately consists of no more than assisting the parties to avoid false negotiation failure by overcoming those barriers to settlement that flow from such factors as the parties’ emotions, faulty communication, failure to accurately identify interests and priorities, and failure to accurately identify and evaluate alternatives to settlement.

Second, the mediator must understand that the negative consequences of being found to have engaged in unethical behavior are likely to be great: loss of confidence and future mediation engagements from both the disputants involved and all those to whom they communicate their knowledge of the mediator’s conduct.

Although the latter of these points is well understood in the mediation community, we are less certain—in light of the emphasis placed on settlement rates—that all mediators fully understand that their real task is not to “get a settlement,” which is the task of the parties, but to clear out the underbrush that gets in the way of settlement. Brazil’s article is extremely valuable in making this point clear, and among the most important tasks of mediation trainers and scholars should be emphasizing this point to mediators, both to protect the mediator from the single-minded pursuit of settlement, with the risks that entails, and to ensure that the mediator can sleep well after a “failed” mediation.◆

Endnotes


2. Id. at 246.

3. Id. at 247, 249–50.

4. Id. at 237–38.

5. In a recent study we conducted on the reasons for mediator success in aiding parties to resolve disputes, the process skill most frequently mentioned by the respondents as contributing to mediator success was the mediator’s persistence. Stephen B. Goldberg and Margaret L. Shaw, The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three, 23 NEGOTIATION J. 393 (October 2007).


7. Communication to Margaret Shaw from Wayne Kessler, AAA Vice President, Corporate Communications, Sept. 7, 2007. This figure includes not only commercial mediations but also hurricane mediations and conciliations.


10. These standards were jointly developed and adopted by the American Arbitration Association, American Bar Association, and the Association for Conflict Resolution.

11. See Goldberg and Shaw, supra note 5.

12. This last comment suggests an explicit marketplace check on undue pressure by the mediator to bring about a settlement. We have no evidence, however, concerning the prevalence of this view.
Learning From “Cooperative” Negotiators in Wisconsin

What can you do if you are a lawyer and want to negotiate cooperatively with the other side from the beginning of a dispute? Of course, in some cases, parties and lawyers do negotiate or use other settlement processes at the outset. Often, however, they use a litigation-oriented process and, even though they may eventually settle, too often the process is more expensive, time-consuming, and destructive than necessary.

To negotiate constructively from the outset of a matter, some lawyers use a “Cooperative” process, giving parties an additional process option, especially if parties believe that mediation or Collaborative practice is not suitable. Cooperative practice offers parties the opportunity to have lawyers represent them in an interest-based process governed by a negotiation agreement—while retaining ready access to litigation if needed, without losing their lawyers as in Collaborative practice. Cooperative practice can increase interest-based negotiation in direct negotiation between lawyers, increase efficiency and satisfaction with negotiation, and influence the general legal culture to incorporate problem-solving in everyday practice more often.

Cooperative practice is a recent innovation involving an agreement by both sides structuring a negotiation process to produce early and efficient settlements. Typically, Cooperative negotiation agreements involve a commitment to negotiate in good faith, provide relevant information, and use joint experts when appropriate. Cooperative processes have been used in divorce and employment cases and can be used in virtually any civil matter. For example, the Garvey Schubert Barer law firm uses a Cooperative process they call “Win” (Win Squared) in employment cases; the Boston Law Collaborative uses a cooperative process in family, business, and employment cases; and the Divorce Cooperation Institute (DCI) uses a Cooperative process in divorce cases.

This article presents findings from a study I conducted about how DCI members use the process. Learning from DCI’s experience, parties and lawyers can identify situations in which cooperative negotiation would be ideal, with possible application in a wide range of civil cases, including family, employment, probate, construction, commercial, and tort cases, among others.

How Cooperative Negotiation Works

DCI is an organization of more than 70 Wisconsin lawyers that was founded in 2003. DCI’s approach involves an explicit process agreement at the outset, which may be written or oral. It is based on principles of 1) acting civilly, 2) responding promptly to reasonable requests for information, 3) disclosing all relevant financial information, 4) obtaining joint expert opinions before obtaining individual expert opinions, and 5) using good-faith negotiation sessions, including four-way sessions where
appropriate, to reach fair compromises based on valid information.\textsuperscript{5} When the parties reach an impasse, many Cooperative lawyers turn to mediation before using litigation. Most DCI members in the survey indicated that they use oral agreements (based on DCI’s fundamental principles), though most believed that it would be desirable to use written participation agreements more often.

DCI members generally shared goals of providing a process that is 1) based on valid information, direct negotiation, and client decision making; 2) tailored to the parties’ needs; and 3) efficient. They wanted to satisfy clients’ and children’s interests, reduce conflict, and produce fair results. They wanted to minimize use of the courts—and also have access to them if needed—to promote constructive resolutions.

DCI members generally thought that a Cooperative process is appropriate only when there is a good chance that it would be productive. Most said it is appropriate when the lawyers and parties on both sides are willing to be reasonable and there are not problems that would seriously undermine the parties’ ability to negotiate with confidence, such as serious fraud, domestic abuse, mental health problems, or substance abuse.

Four-way meetings are major features in Cooperative cases. The vast majority of survey respondents said that they use at least one four-way meeting in most of their Cooperative cases, and about half said that most negotiation takes place in the four-ways in most of their cases. Thus, lawyers tailor the process by using four-ways only when needed. Moreover, even in four-way meetings, there may be some “shuttle diplomacy” (where the lawyers talk with each other and then go back to their clients) or caucuses (where each pair of lawyers and clients meets separately). When lawyers or parties decide to do some negotiation outside of four-way meetings, it is to promote the goals of the Cooperative process. For example, some divorcing spouses may want to cooperate but may have a hard time working directly together. One lawyer said that when there is “volatility” between the parties, four-ways are risky because they can “make settleable cases unsettled.” Similarly, four-ways may be considered inappropriate if parties are too uncomfortable in participating directly in the negotiation, such as some cases involving domestic abuse.

DCI members reported that they normally avoid using formal discovery and contested court hearings in Cooperative cases, though litigation sometimes can be a helpful resource in advancing a Cooperative negotiation process. In these cases, litigation procedures are the last resort and generally intended to advance the Cooperative process. For example, one lawyer said that a party may need the “reality therapy” of a temporary order hearing and then get right back to negotiate a permanent resolution. Survey respondents said that the use of litigation procedures in Cooperative cases usually does not prevent people from negotiating cooperatively.

Some respondents noted that using a Cooperative process can improve the quality of the litigation process if litigation is needed. One lawyer said that when there are trials or hearings in Cooperative cases, the dynamics tend to be more cooperative than in litigation-oriented cases. She said that in Cooperative cases often there is much more dialogue to develop a “mutual game plan” and to narrow the issues to be tried. As a result, hearings have been very satisfying experiences where both sides presented legitimate legal arguments and the process was not adversarial. One lawyer said that a Cooperative process formalizes how attorneys should practice law but too often don’t.

**How Cooperative and Litigation-Oriented Processes Differ**

Although a Cooperative process sometimes involves litigation procedures, DCI members sharply distinguished it from traditional litigation. In litigation-oriented practice, they saw the lawyers’ and parties’ mindsets as being quite varied, which makes it hard to know what to expect in many cases. Although lawyers in litigation-oriented cases sometimes act cooperatively by sharing information and negotiating reasonably, they cannot assume that they can trust the other side to act cooperatively or honestly. Because many parties and lawyers fear being exploited in litigation, both sides may feel compelled to take an adversarial posture to protect themselves. Thus, when lawyers and parties are in “litigation mode,” there is a significant risk of escalating the conflict.

DCI members believed that in Cooperative cases, the lawyers generally could be counted on to have positive mindsets and thus negotiate respectfully and in good faith. This mindset is built into the process as the reasonableness of the participants is a critical factor in determining whether to use a Cooperative process. Although DCI members said they appreciate negotiating with other DCI members, the vast majority of Cooperative lawyers said that they are willing to use a Cooperative process with lawyers who are not DCI members.

The differences in lawyers’ mindsets are reflected in differences in the DCI members’ accounts of procedures used. In litigation-oriented practice, the process is structured through litigation on an ad hoc basis. Lawyers often start by using unilaterally initiated litigation procedures instead of informal efforts to cooperate, such as voluntary exchanges of information or use of joint experts. DCI members said that four-way meetings are relatively rare and that parties’ participation and decision making may be quite limited. They said that in litigation-oriented cases, the process and results vary a lot, the time and expense are sometimes greater than necessary, and the parties’ satisfaction is sometimes lower than necessary. One lawyer said that in a traditional litigation context, the parties—and often their lawyers—tend to be more desperate, panicked, narrow-minded, greedy, and worried about what they will get out of the case.

By contrast, in Cooperative cases, DCI members...
generally reported that they begin with negotiation, employ mediation when they run into problems, and use litigation procedures as a last resort. They try to tailor the process to fit the needs of each case to make it as efficient as possible. DCI members said that the Cooperative process gives parties more “ownership” and creates a “culture of civility,” which “reduces the ‘heat’ of the case.” As a result, they believed that parties often are more satisfied with the process, outcome and efficiency.

How Cooperative and Collaborative Processes Differ

Cooperative and Collaborative processes are somewhat similar to each other, and about half the DCI members in the study offer both processes. In Collaborative practice (often called Collaborative Law) lawyers and parties sign a “participation agreement” establishing a negotiation process to produce a fair agreement for both parties. A “disqualification agreement” is an essential element of the participation agreement. It provides that if any party engages in contested litigation, all the lawyers are disqualified from representing the parties, who must hire new lawyers if they want legal representation.

The Collaborative movement has grown dramatically since it began in 1990. It has an international professional association and many local practice groups in the United States, Canada, and other countries. Collaborative practitioners have developed professional standards for trainers, practitioners, and Collaborative practice as well as detailed participation agreement protocols. Collaborative practice is used almost exclusively in family cases despite great efforts to use it in other types of cases.

Just as DCI members developed their Cooperative process as an alternative to litigation-oriented practice, they designed the process as an alternative to Collaborative practice as well. The study captured their perceptions of Collaborative practice in Wisconsin, which may differ from the process elsewhere.

DCI members generally saw the process in Collaborative cases as more predictable than in litigation-oriented cases. They generally believed that Collaborative lawyers have a positive mindset and that people can expect to be treated honestly and respectfully in Collaborative cases.

By contrast, some DCI members had a strong reaction against what they saw as an inflexible ideological view by many Collaborative practitioners about what are (and are not) appropriate negotiation practices. DCI members—

including many who handle Collaborative cases—generally believed that the Collaborative cases are too rigid and too long. DCI members said that the Collaborative process is done almost exclusively in four-way meetings, which were sometimes unnecessary or too long. Many said that the process often involved too many professionals such as coaches, financial experts, and child development experts and that the use of large teams of professionals sometimes diminishes the roles of parties and lawyers. DCI members said that when parties do not reach agreement in the Collaborative process, they typically do not use mediation.

DCI members differed in their views about the disqualification agreement. Some believed that it often promotes a good process whereas others thought that it may lead clients to fear that their lawyers will abandon them or that they will feel pressured to settle. One lawyer described a Collaborative case in which his client “went ballistic” in reaction to the other side’s proposal, but the disqualification agreement caused the client to make an extra effort to settle the case because the cost of failure was so large. On the other hand, some DCI members were concerned that the disqualification agreement would force lawyers to “abandon” clients when they need their lawyers the most, requiring them to incur the expense of educating a new lawyer. Some lawyers said that the disqualification agreement puts great pressure on parties, with one likening it to having an “anvil hanging over their head[s].”

DCI members generally saw Collaborative practice as an improvement over litigation-oriented practice in increasing parties’ satisfaction, especially with the outcomes. Many said, however, that it sometimes requires more time and money than necessary, which can reduce parties’ satisfaction with the process.

Helping Parties Choose a Process

One of the virtues of the ADR movement is that it offers parties a range of processes for handling their conflicts, and the experiences of DCI members suggest that Cooperative practice can be a beneficial tool for lawyers and parties. An important role for dispute resolution professionals (defined broadly to include public and private neutrals, lawyers, and court personnel) is to help parties choose a “forum” that they believe best “fits their fuss.” Although it is sometimes appropriate to manage a process primarily through litigation—such as when a party or lawyer is untrustworthy—it is often better to use an alternative that may be more constructive and efficient. For example, mediation has become very popular in recent
decades as it provides the advantage of having a neutral professional manage a negotiation process. Early neutral evaluation also employs a neutral, though the focus is on providing guidance about the legal merits and, if necessary, management of litigation.

In Collaborative family practice, the parties’ lawyers manage the negotiation process, which some parties may prefer because their lawyers provide legal advice and leadership in the process. The Collaborative movement has invested great resources into promoting high-quality service through development of practice protocols, educational materials and training for practitioners and parties, and professional continuing education requirements. The process is especially desirable for divorcing spouses who trust each other and who want a process with a highly developed protocol and ready access to a range of coaches, child development experts, and financial experts. It is appropriate for well-informed parties who believe that the benefits provided by the disqualification agreement outweigh the risks. The disqualification agreement clearly promotes productive negotiation in many cases, though it is not necessary or sufficient to promote collaboration. Some people struggle to collaborate even with a disqualification agreement, and many people negotiate quite well without one. David Hoffman, who is co-chair of the Section of Dispute Resolution’s Collaborative Law Committee and has handled cases with and without a disqualification agreement, argues that the “chemistry, intentions, and skill of the participants” are more critical to the success of a negotiation process than whether the parties use the disqualification agreement or not.

Parties may prefer a Cooperative process instead of a Collaborative process when they 1) trust the other party to some extent but are uncertain about that person’s intent to cooperate, 2) do not want to lose their lawyer’s services in litigation if needed, 3) cannot afford to pay a substantial retainer to hire new litigation counsel in event of an impasse, 4) fear that the other side would exploit the disqualification agreement to gain an advantage, or 5) fear getting stuck in a negotiation process because of financial or other pressures. In addition to concerns about the disqualification agreement, parties may want an alternative to Collaborative practice if they want to tailor the process differently from local Collaborative practice norms in their area. For example, in some areas, parties cannot use a Collaborative process if they do not want to work almost exclusively in four-way meetings or if the opposing counsel has not been trained in Collaborative law. Parties in nonfamily cases may be especially interested in a Cooperative process because parties in those cases generally are less willing to risk losing their lawyers if they cannot reach a settlement.

Lawyers who want to do Cooperative practice may consider DCI’s procedures, which can be adapted for almost any kind of case. Cooperative practice may be particularly appropriate when the lawyers have worked well together in the past. Lawyers can convene a four-way meeting early in the case to jointly identify issues, exchange information, and plan how to handle the case in the future. They may also organize practice groups to develop practice norms and help lawyers develop reputations for cooperation.

Cooperative practice, like all dispute resolution processes, is not appropriate in all cases, but it can be the best process for some parties. When dispute resolution professionals help parties choose a dispute resolution option, a Cooperative process should be on the list of alternatives they consider.

Endnotes
3. See Divorce Cooperation Institute, cooperativedivorce.org.
4. This study is based on in-depth interviews and surveys of DCI members conducted in 2007. See John Lande, Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin, 2008 J. DISP. RESOL. 203. This article is adapted from that study. The study and other information about Cooperative practice can be downloaded at www.law.missouri.edu/lande/publications.htm#ccl.
5. For the full version of the principles, see cooperativedivorce.org/about/principles.cfm.
6. In the overall Collaborative movement, there are some variations in practice models, particularly between practice communities, but also within them to some extent. Even so, there are concerns within the movement about whether there is orthodoxy regarding terminology and procedure.
8. Collaborative law is a form of limited-scope representation because the disqualification agreement precludes lawyers from representing clients in litigation. Under the Model Rules of Professional Conduct, “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2007). Thus before undertaking a Collaborative representation, lawyers must determine whether the process is reasonable for their clients and obtain their informed consent. The Model Rules define informed consent as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Id. R. 1.0(e). See also John Lande & Forrest S. Mosten, Collaborative Lawyers’ Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients’ Informed Consent to Use Collaborative Law (unpublished manuscript). In this respect, Collaborative law is different from traditional lawyering because it is not clear whether lawyers are generally required to advise clients about ADR options. See Marshall J. Breger, Should an Attorney Be Required to Advise a Client of ADR Options?, 13 GEO. J. LEGAL ETHICS 427, 428–31, 433–36 (2000).
Consider the following events detailed in Wilson v. Wilson: A divorce mediation conducted mostly in caucus sessions concludes with a signed agreement. The husband reconsiders the agreement a couple of days later and seeks to set it aside, explaining that at the end of the nine-hour mediation, exhausted and without his medication for depression, he signed the agreement to end the process. The wife seeks enforcement of the settlement through the court. To learn more about the husband’s condition at the mediation, the judge calls the mediator to testify.¹

Many readers will recognize similarities between these events and those in Olam v. Congress Mortgage, Inc. and Randle v. Mid Gulf, Inc.² These cases present issues of disputant capacity, informed consent to participate in mediation, and mediator communication with the court. Respectively, we might group these concerns as matters of fitness, fit, and contact.

**Fitness: Mediation as an Endurance Sport**

The mediation in Wilson v. Wilson lasted nine hours, not atypical for domestic or other civil mediations and certainly short of the 15-hour marathon reported in Olam. Meeting for long hours can be functional to mediation in a variety of ways: It permits...
full exploration of the issues involved and sufficient time for development and consideration of offers and counteroffers; it reduces the number of meetings requiring the coordination of many individuals' schedules; and it may induce disputants to tire of the negotiation (or simply in the negotiation) to the point of acquiescence.

In light of the growing prevalence of mediation and the frequent incidence of chronic diseases that may affect one’s stamina in mediation—consider that among U.S. citizens in 2003, one in eight suffered from hypertension and one in ten from a mental disorder—claims of exhaustion such as those in Wilson are to be expected. In Randle v. Mid Gulf, Inc., the plaintiff “who was on heart medicine, tried to set aside a mediation settlement agreement by claiming that despite chest pains and fatigue, he was told that he would have to continue in the mediation session until he was willing to reach agreement.” 6 Similarly, in Olam, the 65-year-old plaintiff suffering from high blood pressure, headaches, and intestinal pains sought to rescind her mediated agreement based in part on her claims of compromised participation. Motivating parties toward settlement is among a mediator’s tasks, and permitting discomfort may be highly motivating; as Terrence Croft, an Atlanta-based mediator, observed recently, “Mediation is not a stress-free environment.”

Professor James Coben polled mediators about whether it’s appropriate to encourage parties to skip lunch to build pressure toward agreement and was stunned by the enthusiastic positive response he received from most. “Acquiescence through exhaustion—now that’s an ethically healthy approach to dispute resolution to make us all proud,” he reflected. 5 Recognizing that disputants encounter physical and mental stress in mediation, to what extent should mediators, or the courts that refer disputants to them, be expected to forewarn disputants? To appreciate the mixed messages for mediators, consider the comments of “sophisticated mediation users” reported in the ABA’s Task Force on Improving Mediation Quality Final report:

Follow-through is patience and persistence but not stubbornness. Mediators need to know when to keep the mediation going and when to stop it. They should be prepared to stay late—and as long as it takes to finish the mediation. 6

When considering the disputants’ experiences in Wilson, Randle, Olam and other cases, it’s fair to wonder whether mediation requires some advisory packaging: “Warning: This dispute resolution process may involve long hours, many in small rooms alone (while the mediator meets in caucus with other parties) and without obvious opportunity to obtain food, drink, or even necessary medications.” Professor Nancy Welsh has questioned how such stresses as mediator pressure relate to self-determination, and has argued that a “cooling-off” period may provide some relief for the stress described. 7 This accommodation meets the interests of party self-determination through an opportunity for reflection or consultation, although it diminishes parties’ assurance of finality following a mediation.

Fit: Is Mediation Right for Everyone?
A virtue of mediation extolled at length is its broad accessibility and its procedural informality. In most court-connected mediation programs, there are few restrictions on which cases (and therefore which disputants) may engage in mediation, and the literature of the field suggests that many court systems direct a considerable proportion of divorce and other family matters to mediation, as does the court in which Wilson was heard. Some observers have proposed screening criteria or process adaptations to ensure a good “fit” between the parties and the process, but anecdotal evidence suggests many programs screen only for issues of domestic violence, not disputant capacity. The definitions and measures of capacity and competence are complex matters.

As early as 1984, Albie Davis and Richard Salem advised mediators to terminate mediation when a party lacks the ability to identify his or her interests or to comprehend the effects of an agreement. 8 More recently Allen Barksy has argued that parties are fit for mediation when they possess “the capacity to participate fairly and fully in the proceedings,” a capacity Connie Beck and Lynda Frost detail as including a rational and factual understanding of the conflict, an ability to appreciate their options (and the consequences of those options), and to select those in their best interests. 9 Documented cases concerning a disputant’s inability to conform to the norms of mediation has been considered in case law, such as an Alaska case in which a court permitted a mediator to testify that a party acted “irrationally” in mediation, 10 and in mediation research, such as a New York case detailing parties’ inabilities to comprehend how issues relate to one another, understand the nature of a behavioral commitment, or distinguish the role of mediator from judge or police officer. 11

Mr. Wilson sought to retract his agreement on the basis of his mental and emotional condition at the conclusion of mediation. He testified that “he suffered from depression and was depressed on the day of the mediation; . . . that he was upset and cried during the mediation process; and that he does not remember signing the settlement agree-

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ment." Further, his psychiatrist testified to the court that Mr. Wilson has been diagnosed with bipolar disorder and treats it through medication.

The Georgia Commission on Dispute Resolution has required mediators to explain the mediation process fully before commencing a mediation, so that disputants may realize self-determination. The explanation must include nine points, such as the role of the mediator, the bounds of confidentiality, that parties should mediate in good faith, and more. In response to the Wilson case—specifically, Mr. Wilson’s claim that the settlement should be set aside due to his incapacity—the commission has added another point: “An explanation that the parties, by their participation, affirm that they have the capacity to conduct good-faith negotiations and to make decisions for themselves, including a decision to terminate the mediation if necessary.”

This is reminiscent of Raymond Smullyan’s logic puzzles, in which knights and knaves have identical appearances, but opposite behaviors when it comes to veracity: knights always speak truths and knaves always tell lies. The goal of the puzzles is to ascertain who is whom, which is a knight and which is a knave. Asking, “Are you a knight?” does not get one far—for knights and knaves would offer the same reply (astute readers will note that “Are you a knave?” yields no better). And so it is with one’s questions—or “through their participation” affirmations—of capacity to mediate.

Whether rhetorical and implicit, as the new guideline suggests, or explicit in the form of the question, “Are you competent to participate in mediation?” the response will almost always be affirmative. And so while this policy may head off objections based on incapacity made after a settlement, how might the field meet the interest of protecting those individuals who truly don’t possess the competence to make effective use of mediation? A related issue—that one’s capacity may change over the course of mediation—also bears attention.

**Contact: Refereeing the Communication Between Judges and Mediators**

In most jurisdictions, mediation is held to be a confidential process, designed to promote candor in negotiations toward possible settlement. The history of mediation in court contexts, however, is dotted with perplexing instances of contact between mediators and others, during which the mediator shares information some would expect to remain confidential. In the recent review of litigation arising from mediation, Professors Coben and Thompson found that the confidentiality of mediation communications was the key concern in 130 cases; in 60 of these, courts did not uphold confidentiality protections. Among the justifications for compelling mediator testimony, the researchers found courts “concluding the evidence was offered for a permissible purpose,” as was reasoned in Wilson—especially given that the majority of the mediation took place in caucus sessions, only the mediator interacted with Mr. Wilson extensively that day.

Olam presents a similar rationale and represents the most detailed explanation of the court’s perceived need of the mediator’s account: Judge Wayne Brazil argued that “testimony from the mediator would be the most reliable and probative on the central issues.” This is consistent with Johnson’s observation that “Despite the importance of confidentiality to the mediation process, it is at odds with a judicial system that favors consideration of all relevant evidence.” Further commentary on Olam recognized “the potential conflicts among the policy goals of judicial economy, fairness, and maintaining the integrity of the mediation process when they are presented in the context of individual cases,” and just such a conflict played out in Wilson. Setting aside judicial economy, this raises two difficult questions about the mediator’s testimony.

First, is a mediator sufficiently trained in assessing a disputant’s fitness for mediation? Professor Patrick Coy and I have observed, addressing differential cognitive or emotional abilities of disputants puts mediators in a dangerous and delicate situation. It is dangerous because few, if any, . . . mediators are trained in mental health diagnosis and psychological assessment. These analytical processes are difficult enough for highly trained and skilled professionals who have ample assessment time with their clients.

And second, Smullyan’s knights and knaves hint at the predictability—and thus limited utility—of the mediator’s likely response. A close colleague has pointed out, “Who’s going to say, ‘The parties didn’t seem competent to mediate, but I went ahead anyway’?”

Many observers have commented on the perils of good-faith reporting requirements for mediation, and we might borrow from their logic: Communication concerning a disputant’s capacity to mediate, while respectful to keep substantive issues confidential, may undermine the functions of confidentiality and self-determination in mediation.

**Recommendations**

How might a court ADR program respond effectively to these issues? I offer a few proposals for consideration, in full recognition that many programs already have adequate procedural protections in place.

1. **An enhanced preparation process,** including screening and expectations. Program coordinators could provide disputants two short forms—one describing the process of mediation and another seeking information about any factors that may limit a party’s ability to participate in mediation. I envision the first to integrate elements of informed consent highlighting the party’s right to terminate at any time, the absence of adverse effects for not arriving at an agreement, the bounds of mediator pressure, and the possibility of long hours with a practical guide to negotiation preparation.

The second form would invite disputants to bring any food or medication they would offer the same reply (astute readers will note that “Are you a knave?” yields no better). And so it is
might require during a long meeting.

2. A suggestion that disputants bring a support person. A shared trait of many cases in which capacity concerns have arisen has been the absence of representation; many mediators and attorneys have raised this distinction as a source of difficulties. Let us recognize that parties may have good reason for forgoing legal counsel at mediation, including perceptions of prohibitive cost and protections such as “cooling off” periods during which counsel might review tentative agreements. Borrowing from a practice increasingly common in the medical field, I believe there could be considerable value in recommending to parties that they bring a support person, be she an attorney or other negotiation coach, or a family member or friend. The role of this person could be to remind the disputant of her own identified priorities and alternatives (from the negotiation preparation guide proposed above), and of her option to terminate the process.

3. Guidance to (and perhaps training of) mediators concerning ongoing assessment of disputants’ ability to participate in mediation. Although it is certainly not a mediator’s primary role to assess a party’s fitness or condition throughout mediation, it may be useful to encourage occasional “check-ins”—these might be occasioned by the mediator’s perception of a change in the party’s demeanor, the passage of a long stretch without a break, or a sense of acquiescence beyond that typically accompanying compromise. As Wilson and other cases have demonstrated, mediators might do well to err on the side of asking too often about a party’s condition instead of plowing ahead.

4. (Re-)Clarification of communication guidelines between mediators and others. The Wilson case demonstrates again the need for clear guidance to mediators, judges, and others involved in mediation concerning communication about mediation. Interestingly, the Committee on Ethics of Georgia’s own ADR commission addressed this very topic in a 2005 advisory opinion: “The pledge of confidentiality extends to the question of conduct in the mediation, excepting of course threatened or actual violence. The possible damage to the process by reporting more than offsets the benefits in a given case.”

Endnotes

1. For further details of this case, consult Wilson v. Wilson (Georgia, 2007, 653 S.E.2d 702).
7. Nancy Welsh, The Thinning Vision of Self-Determination in Court-
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 rep-
resent 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
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 Mar Q
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
1982).

6. Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, Let’s
Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful

Minnesota Among Several States Looking at Mediation of Foreclosures

Minnesota Attorney General Lori Swanson has turned to the state’s agricultural roots for a solution to the foreclosure crisis: mortgage mediation. Swanson has proposed a “Homeowner-Lender Mediation Act,” modeled after the state’s Farmer-Lender Mediation Act, which was adopted by the Minnesota legislature in March 1986 during the farm crisis. Under that act, a lender seeking to foreclose on farm property must offer to mediate the debt while the foreclosure is held in abeyance. The process, which is now managed by the University of Minnesota Extension Service, has helped an estimated 14,000 farmers, according to the attorney general’s office.

The proposed act would call for prompt mediation and defer foreclosure for at least 90 days so long as the parties negotiated in good faith, and the homeowner would be offered financial counseling. If the lender did not bargain in good faith, the case would go to court-supervised mediation, and the foreclosure would be deferred another 60 days.

But reaching to the 1980s for a solution brings the proposed statute into conflict with modern finance: Many mortgages are owned not by the companies that service them but by investors who bought mortgage-backed securities. The state’s ability to find those investors, and its ability to compel action on their part, has not been tested.

A foreclosure relief plan similar to Swanson’s proposal passed the legislature last session but was vetoed by Governor Tim Pawlenty, according to the business journal Finance and Commerce.

Minnesota is one of several areas considering foreclosure mediation programs. In June, Connecticut created the first program in the country, appointing 12 staff mediators to handle foreclosure cases. Some areas in Ohio, at the suggestion of the state supreme court, have begun foreclosure mediation programs as well. In October, the New Jersey Supreme Court established a statewide judiciary program to mediate foreclosure cases.

“While the courts must remain neutral in all foreclosure matters, it is in everyone’s best interest to have a forum where homeowners facing foreclosure have the opportunity to negotiate to save their homes,” Chief Justice Stuart Rabner said. “Our goal is to get lenders and borrowers to meet at the table and work out a mutually beneficial arrangement.” For more information on mediation foreclosure programs, see the Section’s resource page at www.abanet.org/dispute/mediation/resources.html.

Virginia Relaxes Mediation Confidentiality in Wrongful Death Suits

The Virginia Supreme Court has ruled that state law requiring court approval of wrongful death settlement that makes the terms a matter of public record trumps the state’s mediation confidentiality statute.

In Perreault v. The Free Lance-Star, 666 S.E. 2d 352 (2008), Sue Carol Perreault and three others acting as administrators of estates sought to keep private the terms of settlements reached with B. Braun Medical, Inc., and its subsidiary, Central Admixture Pharmacy Services, over lawsuits that asserted the companies were liable for the decedents’ deaths during open-heart surgery. The parties in such settlements are required to file a petition with the circuit court; the parties sought to keep the terms private by petitioning the court orally.

The Free Lance-Star, published in Fredericksburg, and the Richmond Times-Dispatch sought to intervene, saying that the details of the settlements should be entered into the court record and thus become public information.

In June 2007, the circuit court ordered that the four representatives file written petitions that included all the terms. It also denied a request to allow the parties to redact the terms. The parties appealed, contending that the circuit court did not give proper weight to the confidentiality of mediation.

The state supreme court reviewed the matter de novo. In its analysis, the court established that petitions in death settlements must be entered into the record; that the wrongful death law, a statute of precise and specific intent, took precedence over the more general mediation law; and that the presumption of openness overcame the concerns of the plaintiffs about the effects of making a private bargain public.

District Court Says FAA Preempts New Jersey Ruling on Class Arbitrations

The New Jersey Supreme Court’s ruling that class-action waivers in arbitration clauses are unenforceable is preempted by the Federal Arbitration Act, a federal court held in September.

The U.S. District Court for the District of New Jersey ruled in Litman v. Cellco Partnership, No. 07-CV-4886, 2008 WL 4507573, that Verizon Wireless customers who filed a class action lawsuit over an “administrative charge” added to their bills were required to submit to arbitration on a case-by-case basis because they had signed a contract that contained such a clause.

Cellco, doing business as Verizon Wireless, imposed an
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administrative charge in October 2005 varying between 40 cents and 70 cents a month for each phone. The company had rewritten its arbitration clause the previous January to prohibit class arbitration. Keith Litman and Robert Wachtel sued, alleging that the charge was improperly imposed and that the arbitration clause had been “adhesively” modified. The plaintiffs relied on Muhammad v. County Bank of Rehoboth Beach, Del., 189 N.J. 1, 912 A.2d 88 (2006), which held that such clauses prohibiting class action in low-value claims acted as exculpatory clauses and were unconscionable under New Jersey law.

Noting that the Third Circuit has found that class waivers in arbitration agreements are not unconscionable per se, the court said the Muhammad decision, which in effect targeted such agreements, conflicted with the FAA.

In a footnote, the court said it recognized that such a decision essentially left the plaintiffs without an effective form of redress. But citing Gay v. CreditInform, 511 F.3d 369 (2007), the court noted that placing limitations on the reach of the FAA was up to Congress, not the courts.

Texas ADR Act Does Not Allow Mediator to Serve as Expert Witness

A judge who served as a mediator in a settlement process involving two parties in a later lawsuit cannot be called as an expert witness in that litigation, the U.S. District Court for the Eastern District of Texas has ruled.

In Duininck Brothers v. Howe Precast, No. 4:06-cv-441, 2008 WL 4411608, the court focused on the integrity of the mediation process in its ruling. Duininck, the general contractor on a state highway project, hired Howe to place and maintain concrete traffic barriers. Several accidents occurred after rainstorms because of the standing water that accumulated due to the barriers’ placement. Duininck settled the four lawsuits that were filed and sued Howe to recover the money it paid to settle two of the suits. Howe claimed that the settlement expenditures were unreasonable.

Duininck submitted an expert’s report from the mediator in the settlements, Ray Grisham, addressing the reasonableness of the attorneys’ fees. Howe, citing Grisham’s role as a mediator, sought to strike him as a witness.

Although the text of the Texas Alternative Dispute Resolution Act did not clearly apply to the motion, District Judge Richard Schell noted that “sensitive information, highly relevant to this proceeding” had been disclosed to Grisham in his role as mediator, information that would not have been disclosed to someone who might act as an adverse witness in related proceedings. Thus, allowing Grisham to be a witness would be contrary to the mediation act’s intent of providing for a reliably confidential forum to resolve disputes.

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