Kluwer Mediation Blog

Overcoming Impasse in Mediation

Rick Weiler (Weiler ADR Inc.) · Wednesday, November 6th, 2019

"Impasse" – a situation in which no progress is possible, especially because of disagreement; a deadlock.

Last time I focused on impasse in mediation, I noted that in my experience as a commercial mediator, impasse most often flows from a combination of cognitive biases and flawed risk assessments. This post suggests ways mediators can help parties in mediation move beyond impasse and achieve resolution.

Why are we at Impasse?

First, mediators must appreciate ***why*** lawyers and their clients are struggling with these cognitive biases. Cognitive science has identified two information processing systems within the human mind: System 1 and System 2.

System 1 is an intuitive system that automatically and quickly processes information using unconscious innate heuristics and over-learned habits to produce a judgment in seconds. This is sometimes referred to as "fast thinking."

System 2, on the other hand, is an analytic system that uses reflective, conscious thought processes to solve complex problems, so-called "slow thinking."

Cognitive biases, like Loss Aversion, Overconfidence Effect, Reactive Devaluation, and

Confirmation Bias, as well as flawed risk assessments, generally flow from System 1 fast thinking. The challenge for mediators is to encourage the parties to think again using System 2 slow thinking.

For mediators, there are three critical skills for encouraging this shift: asking, listening, and telling.

Asking

An excellent resource for mediators that goes into this issue in great depth is, "Why Can't They Settle? The Psychology of Relational Disputes" by Harry L. Munsinger and Donald R. Philbin, Cardozo J. Of Conflict Resolution [Vol 18: 311 2017]. One of the key takeaways from this paper is, "The most effective way to overcome optimism bias is for the mediator to test the client's assumptions about the case through open-ended questions that shift the participant from System 1 to System 2 information processing."

The open question, the question that cannot be answered with a simple "yes" or "no," is a critical communication tool all mediators are drilled on in their basic training. Still, in the hurly-burly of real mediations, day after day, it's a tool that sometimes languishes, unused, in the mediator's toolbox.

- "What's important to you about this dispute?"
- "How do you understand the other side's perspective?"
- "Why do you think we're stuck at this point?"
- "What are the possible outcomes if this matter should proceed to trial?"
- "How would your reservation point for this negotiation change if you adjusted the probabilities you have assigned to each of those possible outcomes?"

These questions and others like them cause lawyers and their clients to engage their System 2 thinking processes fully and can often serve as an essential first step to getting a mediated negotiation beyond the impasse.

Listening

Of course, asking questions is only the first step. Mediators need to listen carefully to the answers. Here are the four keys to active listening:

- Listen attentively- lean forward & don't interrupt
- Pause before replying – be comfortable with silence and don't jump in too quickly
- Question for clarification- "how do you mean?" "And then what did you do?" "How did you feel about that?"
- Feedback and paraphrase in your own words, demonstrating that you've understood.

Telling

A third way to encourage more System 2 slow thinking is for mediators to remind parties of the well-documented tendency to make bad decisions in settlement

negotiations. Instructive here is the paper, "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations" by Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane. The study quantitatively evaluates the incidence and magnitude of errors made by attorneys and their clients in unsuccessful settlement negotiations. The primary research analyzes 2,054 contested litigation cases in which the plaintiffs and defendants conducted settlement negotiations, decided to reject the adverse party's settlement proposal, and proceeded to arbitration or trial. It indicated that plaintiffs erred in refusing offers and did worse at trial sixty-one percent of the time compared with twenty-four percent for defendants. But, the cost of error when wrong was much higher for defendants, $1,140,000 compared to $43,100 for plaintiffs.

Mediators sharing sobering data like this often encourage lawyers and clients to spend more time in System 2 slow thinking, the thinking necessary to better appreciate the strengths of the other side's case and the real risks of their own position. Precisely the thinking essential to break free from impasse!

Conclusion

The effective use of questioning, listening, and telling by mediators helps lawyers and parties to make good decisions, "all things considered", and that is the path that most often leads to settlement.

To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please subscribe here.

The Leading Online Service for International Arbitration
300+ Authors
Nearly 3,000 awards
11,000+ court decisions
2,250+ BITs
Request a free demo now
KluwerArbitration.com
Wolters Kluwer

This entry was posted on Wednesday, November 6th, 2019 at 4:57 pm and is filed under Uncategorized
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.