

Impasse? As a Neutral, a Mediator Can Do Things You Can't

Mediation Steps that Work

By Daniel R. Cofran, J.D.

You've agreed to mediate, but quite frankly you aren't too optimistic. The last settlement offers weren't even "in the same zip code."

So how can it be that the mediation success rate is 70% to 80%? What can a mediator do that you and your lawyer can't do?

Getting to the Same Zip Code

Mediators are neutral "reality agents." As neutral third parties, they do three things well.

First, they get everyone on the same page as to the *important* facts. Simple factual misunderstandings are common in litigation, particularly early on. Mediation is probably the first time the parties have sat down to "hash out" the facts. The results can be eye-opening.

Second, mediators relax the human tendency to overestimate the strength of one's own case and weaknesses in the other side's case. In separate *confidential* caucuses with each party and his or her attorney, a mediator can have frank discussions about a case's strengths and weaknesses.

Third, mediators can help parties establish a *range* of settlement values.

While it depends on the type of case, lawyers frequently do this by (1) adding up a claim's likely *provable* damages, (2) subtracting any uncollectible portion of this amount, (3) multiplying this net figure by the percentage likelihood of success at trial (yes, subjective) and (4) subtracting future legal fees and expenses to try the case. Like Step 2, this is done in a *confidential* session.

Both parties going through these steps with the mediator frequently can generate settlement offers in or



approaching the same zip code.

Closing the Gap

"Saving face" and party animosity frequently keep the parties from making offers directly to each other once they start to close in on the same zip code. A mediator as a neutral third party can bridge this gap. A few examples:

Blind Bidding. The mediator can ask each party to submit confidential offers to the mediator. If the offers are within a previously agreed upon dollar range of each other, the mediator will disclose the offers to the parties and they can split the difference. If outside the gap, the offers remain confidential and the parties proceed by other means to narrow the gap.

Conditional Offer. If the mediator senses Party A is willing to settle for X (or certainly if Party A says he or she will settle for X), the mediator can go to Party B and propose, "If I can get Party A to settle for X, are you willing to offer Y?," to show the parties are getting within range of each other.

Mediator's Proposal. If toward the end of the mediation the parties

are close but nonetheless are stalled, if the parties agree, the mediator can present his or her own proposal. This probably won't settle the case that day, but it can be a basis for settlement at a later date.

Last Best Offer. Similarly, the parties can submit confidential "last best offers" to the mediator who may recommend one of the two.

Non-Cash Inducements

Cash will be the main part of a settlement, but non-cash elements can help close a deal. For example:

- *Continued Business.* Depending on animosity, the parties can agree to do business with each other in the future, but with price breaks, product upgrades, better contract terms and similar "sweeteners."

- *Apology.* Frequently a written apology is important to a party who feels wronged. The issue will be whether it's public or confidential.

- *Confidentiality.* A "covenant of confidentiality" that the settlement will not be disclosed to third parties can be used. These are difficult to enforce, but may provide additional comfort.



Dan Cofran, a Best Lawyer in America, has practiced law for 40 years in corporate and commercial litigation, commercial real estate transactions and land use law. He has a long record in Kansas City civic affairs, including service on the Kansas City, Missouri City Council, many civic organization boards, and as a recipient of many civic honors.