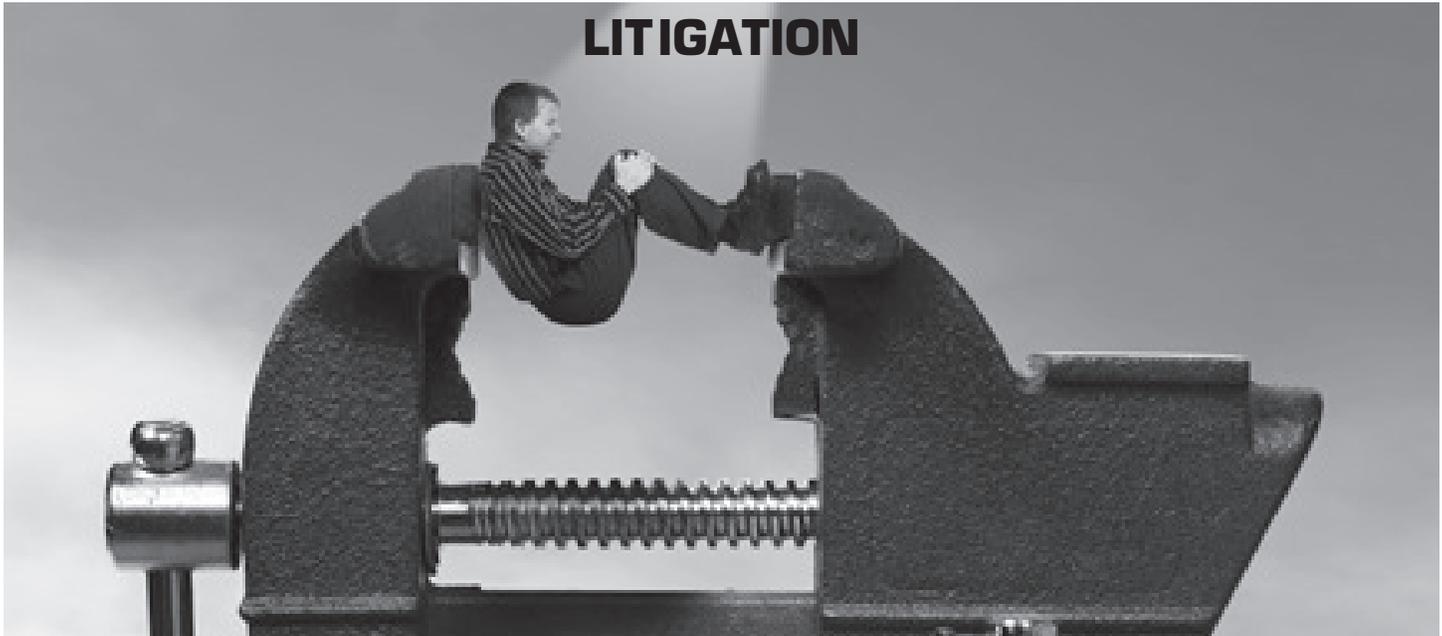


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## A NEW PERSPECTIVE

It's important to view impasse as a process rather than an event, which allows it to be spotted and corrected early

By Dave Rudy

**W**e tend to view impasse as an event — a “bad ending” to a negotiation. Confronting an impasse at the end of the day, we fret over how to deal with it. But it is frequently too late to save the negotiation at that point.

Not all impasse is bad. Some negotiations ought to fail, just as some cases must go to trial. But in most cases, impasse need not have occurred.

Here, we re-examine impasse, not as an event, but as a process that develops over a period of time, with both warning signals and opportunities for correction. The job of the mediator and advocate alike is to spot impasse early, and work at “building impasse out” of the negotiation.

### IMPASSE IS HIGHLY PREDICTABLE

Because it is a process, impasse takes time to build. Negotiators almost always signal their expectations and intentions during the negotiation. Careful reading of these signals allows the attentive opponent and mediator to spot impasse potential long before it becomes irreversible. Impasse is not a surprise event, but a predictable process outcome.

Of course, the mediator is in a unique position to spot impasse early, because he alone is working on every side at the same time. The advocates have more limited information than the mediator. Nonetheless, there is much the advocate can do to address and help solve the problem.

### EXPECTATIONS AND SELF-FULFILLING PROPHECIES

The single biggest cause of impasse is expectations of one party about the ultimate position — “bottom line” — of the others. Expectations lead to predictions. Predictions easily turn into self-fulfilling prophecies.

Most negotiators telegraph both their own expectations and their concerns about those of their counterparts. These signals are not just a problem to deal with, but a danger sign that impasse may be starting to build.

An easy example is settlement amount. Expressions like “I will

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never pay” or “we will never accept” are impasse warnings. When the clues from opposing sides suggest that eventual overlap in settlement value is impossible, the negotiation is likely to fail unless redirected.

Similarly, expressed distrust and shock at the behavior of the opponent are serious warning signs. Some such language is common, almost universal in negotiation. Just its bare occurrence, with nothing more, is not necessarily a problem. But it is crucial for negotiator and mediator to hear the language as signaling possible expectation issues. Heightened awareness leads to careful examination of further clues so that incipient impasse can be dealt with at the earliest possible time.

### CHANGING EXPECTATIONS

Most attorneys consider and even develop their “bottom line” before negotiation and without good detailed information about the opponent’s intentions. This lack of reliable information comes either from sparse communication, or because signals given by one side have been misunderstood by the other. Regardless, the party’s initial approach must become more realistic as more of the opponent’s intent is revealed. Bad information tends to produce initial positions that are unrealistically high on plaintiff’s part and unrealistically low on defendant’s. The safest alternative appears to be for plaintiff to begin or remain high and for defendant to begin or remain low. These positions, and more importantly the expectations behind them, need to change as each party learns more about what the other may actually be willing to do.

After spotting impasse potential, the mediator needs to begin working with the parties to refine expectations. The goal is to develop settlement options which are potentially acceptable to all parties.

The refinement of expectations is a major function of the mediator. Faithful execution of this task is key to success in mediation.

### SPEED AND TIMING PROBLEMS

A major expectation problem is connected to the timing and/or speed of negotiation. The pace of the negotiation is usually unacceptable to at least one side. This often produces distrust and may lead to unreasonably pessimistic predictions of the opponent’s “bottom line.” It is common for a frustrated participant to predict that the opponent’s ultimate goal will be just as unreasonable as his negotiating pace.

A difficult instance occurs when the mediation planned for one day needs to run

longer. Further information (e.g., discovery) may be required. Or, absent decision-makers may need to digest and react to the need for changes in expectations identified by the mediation. The opponent’s perceptions that “today was the day” and that lack of resolution equals failure may lead to other pessimistic predictions.

The mediator’s careful management of expectations throughout the process can usually forestall these problems. Such management begins as early as the mediator’s involvement, sometimes even before commencement of mediation. Unmanaged, the differences in expectations of length and pace of negotiation tend to produce impasse.

### STRATEGIES FOR THE LAWYER

Impasse is far from inevitable, even in difficult negotiations. Preventing it is not the sole obligation of the mediator. Advocates also need to be concerned with the threat of impasse, whether it arises from their own behavior or the opponent’s. Here are just a few suggestions by which attorneys can help preclude impasse.

1) Control client expectations. Especially with the party who is not a regular at negotiation of lawsuits, the lawyer needs to work to keep expectations both flexible and realistic. This alone can go a long way to precluding impasse.

2) Trust the process. Parties in conflict almost inevitably distrust each other, especially when engaged in efforts to resolve the conflict. Trust of the mediator, and especially of the process, will help mitigate even strong mistrust of the opponent.

Trust begins with selection of the mediator. It is not enough to retain a mediator with a good settlement rate. It is not advisable to agree to a mediator simply because he is acceptable to the opponent. Select a mediator that you trust either from previous experience, reliable recommendations, or your personal interview of the mediator. Do not hesitate to call a mediator with whom you have not worked and question her in detail. The most important goal of such an interview is to develop an understanding of the kind of process the mediator uses and whether she is someone you can trust and can work with collaboratively.

3) Combine messages with negotiating moves. The best negotiators make use of the mediator to influence the expectations of the opponent. Coupling a counteroffer with a message can be an effective way to address potential impasse. Such messages should be designed both to draw out expectation

problems and to help change expectations. Messages designed merely to manipulate the other side fail to maximize effective negotiation and ignore impasse issues.

It is very difficult to communicate messages which are fully understood and believed in face-to-face negotiation. It is relatively easy to do so through a mediator.

4) Move to induce movement. It is tempting to respond to a “bad” move by the opponent with a “bad” move in return. Such “tit-for-tat” or “reactive” negotiation is rarely productive and may dramatically increase the risk of impasse. It should be avoided.

There is nothing wrong with varying the amount of movement to keep the opponent off balance. But responding to a small move with a small move sets up a negative dynamic which can easily kill the negotiation. Consider one surprise option which can be extremely effective at revitalizing a stalling negotiation: Move substantially in response to an insubstantial move. There are two dangers. First, the opponent can misunderstand your intent in the move. This actually fortifies wrong expectations and must be avoided. Second, you may have moved too far given the positions of the parties. In such a case, you may place yourself in a negotiating corner.

Both of these problems can be easily overcome. Combine the move with a carefully crafted message that you rehearse with the mediator. Not only will you make a dramatically positive counteroffer, but also you can influence the expectations of your opponent. This strikes a double blow against impasse.

5) Avoid pessimistic predictions. As discussed above, pessimistic predictions easily turn into self-fulfilling prophecies. Since impasse is driven most directly by expectations, the successful negotiator guards both himself and his client against developing unhelpful predictions. Neither optimism nor pessimism taken to unrealistic levels is productive in negotiation. Realism with an optimistic cast is always the most successful approach.

### CONCLUSION

Avoiding impasse is achievable. The mediator and the lawyers can work collaboratively and even independently to build impasse out of mediation. The first step is heightened awareness of the problem. Diligence in reading the signs is next. The suggestions above are not the final answer, but an invitation to further consider the impasse issue at your next mediation. ■