



## **Navigating Divisive Mindsets in Mediation: Strategies to Overcome an Impasse**

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The United States has become increasingly politically and morally polarized over the last several decades. The most recent analyses from Gallup, Axios, FiveThirtyEight, the Washington Post, Fox News and other traditional information outlets speak loudly to this increasing polarization: In a study dated August 7, 2023, titled “Update: Partisan Gaps Expand Most on Government Power, Climate” authored by Frank Newport, Gallup analyzes changes in partisan gaps on selected issues from 2003 to 2023. From far left to far right, this analysis digs deep into the changing nature of partisanship in American attitudes over the past two decades, involving issues ranging from the breadth of government power to guns, abortion, divorce, premarital sex, climate change, immigration, the death penalty, race relations, legalization of recreational drugs and education. The bottom line is that there are large gaps in opinions on these, and other issues, left to right on the political spectrum, and these gaps have not changed significantly, in most respects, over the last twenty years.

This growing division of opinion on major topics of concern in America has crept into the arena of civil litigation and dispute resolution. As a practicing mediator over the last twenty years, I have noticed that there has developed an increasing number of cases which not only become more difficult to resolve but often times come to the point of impasse, requiring very thoughtful, focused and patient handling to break through the impasse and achieve ultimate settlement and resolution of the dispute. By my observation, many parties have become much more focused or “dug in” to positions or beliefs which to me is reflective of the overall “my way or the highway” political climate that currently exists in this country.

In a fascinating text by Maya A. Bodnick, a contributing opinion writer to the Harvard Crimson Magazine, she suggests that Harvard should invite MAGA Republicans to speak at Harvard, even if they are fascists. She opines that she is terrified by what she perceives as a fascist takeover of the Republican party, but she also feels that these “fascists,” as she calls them, should be allowed to speak at Harvard so that a dialogue can be generated, and a learning experience created. As she

puts it, “de-platforming” such speakers by barring them from speaking only serves to keep such radical views from the university students, preventing them from hearing views, though ultra-conservative and perhaps even fascist, held by millions of American voters. Fear of anti-democratic ideas should not prevent engaging in a dialogue about such ideas. Ms. Bodnick’s idea of open discussion of what some may consider abhorrent ideas, can be equally applicable in the context of mediation to avoid impasse.

Partisan divides on issues such immigration, global warming, healthcare and gun laws are further examples of issues which divide left versus right, blue versus red. Similarly, a final demand with a line in the sand is confronted with a final offer and an equally firm line in the sand. Much like our current political climate, it is either red or blue and there is no shade of color in between. So, as a mediator facing parties who are surrounded on a daily basis by this divisive “all or nothing” climate that currently exists, how can you best break an impasse in a mediated dispute?

### **BREAKING IMPASSE**

The first step is to be creative. Be unconventional. Try to think outside of the box and create an avenue or off-ramp that might work for all sides to the impasse.

If there is a significant gap which seems insurmountable, try to create a narrowed negotiating range. High/low suggested brackets are a useful tool in such instances.

An effective mediator can also seek to create momentum by encouraging the parties to move in large increments, or, if big steps are not possible given the dynamic, baby steps may be encouraged to keep the momentum moving forward.

By utilizing honed listening skills, the mediator can focus on the underlying positions of the parties and attempt the tactic of candid and forceful honesty to bring a party who has strayed from reality back into the realm of reason. However, the mediator must be careful here as it can be counter-productive to push parties too hard in the face of the unreasonable position – this can also result in entrenchment by a party or counsel and increase the possibility of a true impasse.

A skillful mediator may also find at a troublesome point like this in negotiations that suggesting a specific settlement figure or range may be helpful to either break or avoid impasse. This can be a very useful tool in narrowing a gap and/or avoiding impasse.

When approaching impasse, at an appropriate juncture, it is also often times helpful to revisit the primary objectives of the mediation session: resolving the issues and settling the case. These very basic tenets of the process can get lost in the fog of negotiation and the back and forth of the process, and it can be helpful to remind the parties why they are there in the first place.

A reminder can also serve to lighten the moment. If fatigue and/or frustration appear to be taking over, it can be a good idea for the mediator to suggest a subsequent mediation session, giving the parties a chance to cool off and perhaps re-evaluate their position, given the information that has been exchanged during the current discussion. By re-emphasizing the advantages of settlement at this juncture of the proceeding, a skillful mediator can facilitate getting the process back on track, focusing on a subsequent session with fresh minds and a renewed effort by all toward final resolution.

## **END GAME**

Because of our politically charged climate, parties and their counsel have become more entrenched in their positions and less willing to entertain countervailing or opposing views. But politics aside, it is my observation as a practicing mediator, at least in a politically active and educated environment like Northern California, that finding compromise in our current climate is more difficult, time consuming and expensive. It is frustrating to see parties and their counsel either mis-evaluate or lose focus or interest of their stated position because of division-driven thinking, which is why employing the tactic of a mediator's proposal is more important than ever.

Perhaps a social scientist would disagree with my hypothesis that this trend is in part due to the world of disinformation and conflict in which we currently find ourselves, but from my perspective in the mediator's chair, I believe there is a correlation.

The best a mediator can do to cope with this trend is to continue focusing on drawing the decision makers into the process, continue to work toward building a deal, and treat all parties with respect, acknowledging their interests and frailties, push to work past anger or unproductive posturing, and perhaps most importantly, continue to be empathetic as well as persuasive. Convincing the parties that the reason they have chosen the course of mediation is a wise one and that settlement is the ultimate prize continues to be the goal and the charge of a skillful mediator.

When impasse rears its ugly head, it must be met with patience and trained exploration of interests, and can most often be avoided if the mediator continues to focus on the benefits of resolution and settlement as opposed to a continuation of the divisive litigation process.

I find that the vast majority of parties and their counsel when asked to take a deep breath and pause for a moment from a point of actual or impending impasse, are able to refocus and redouble their efforts to the negotiation process such that a true stalemate is most often avoided. It is certainly a tap dance, particularly in today's divided society, but it is a dance which can be successfully performed to the satisfaction of all by a properly motivated, patient and focused mediator. It is the art, not the science, that avoids impasse.

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