

IMPASSE – NOW WHAT?

By Christina Magee

Mediations have traditionally culminated in two outcomes: an agreement or an impasse (“no agreement”). These circumstances were codified into the ethical rules in Florida: a mediator’s report to the court should identify whether the mediation resulted in an agreement to settle, or that the parties reached “no agreement” or a “partial agreement.” See, e.g., Mediation Ethics Advisory Council Opinion 2017-006.

Today’s environment presents a different set of choices. Perhaps the parties have spent the day working on a settlement, only to find that a crucial piece of information cannot be established. Perhaps the parties learn that a court in a related case has taken up a dispositive motion, the determination of which could inform how the same issue would be interpreted in the pending case. Perhaps the parties have just been unable to move into a range where either side feels any compulsion to settle.

If an impasse is the outcome of your day in mediation, take heart - impasse does not mean a failed mediation. More significantly, impasse does not mean the end of the settlement process or that the case in question cannot be settled. Many more cases are falling into a category where the option of “continuance” is the order of the day. A continuance set for a date in the future allows the parties a breather from the mediation, knowing they will try again in the future to resolve. This gleam of hope makes clients amenable to the suspension. Instead of viewing it as another bite at the apple, a continuance allows the parties to focus on specific issues that were identified as settlement obstacles. It permits the parties to find an answer to one of the ultimate mediation questions – what would it take to change your position so the case can be resolved?

One final thought. Most mediators are adept at following up with parties when resolution does not take place. If counsel wants the mediator to reach out to see where the other side might be in considering whether to return to settlement talks, counsel can certainly ask the mediator to do so. Consider asking the mediator for advice on an approach to the other side. Some cases see counsel file Proposals for Settlement (Offers of Judgement) immediately after a mediation has concluded without settlement. Using the PFS as a springboard allows the Neutral to reach out to the parties to discuss whether room exists to conclude the talks. There are many other ways for mediators to approach parties to “test the waters” for re-starting settlement discussions. An impasse is not necessarily the end of the story – sometimes it is just the start of a new chapter.