

# Nearing the Finish Line: Dealing with Impasse in Commercial Mediation

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You are likely to experience a range of emotions in your work as a commercial mediator. At the outset you will feel a real sense of pride: People with a difficult problem, advised by experienced lawyers, have selected *you* to help them resolve it. You will work hard to understand what is keeping the parties apart, and can anticipate a real feeling of accomplishment at helping people solve a serious problem.

At some point, however—often during the late afternoon—you may find yourself silently wondering: How did I ever agree to become involved in this mess? This feeling arrives for me most often when the parties have stopped moving, not simply as a tactic or to consider a difficult decision, but in an apparent dead end. At that point I am often out of ideas and low on energy.

This article describes techniques I have used to move deadlocked lawyers and clients toward agreement. They vary from simple options such as challenging the parties, to others, such as parallel bargaining and post-mediator proposals, which you may not have encountered. I will begin with relatively simple approaches, because they are my first resort, and then will describe more esoteric tactics to apply if straightforward efforts fail.

## *Tactics at Impasse:*

1. *Persevere*
2. *Restart the bargaining*
  - *Ask about interests, for a limited time*
  - *Push for linked moves*
  - *Make a special plea*
3. *Ask for help, and wait*
4. *Change the process*
  - *Modify the mix or structure*
  - *Offer an assessment*
5. *Manage the end game*
  - *Play confidential listener*
  - *Offer a mediator's proposal*
  - *Challenge the parties*
  - *Adjourn and pursue*

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## *1. Persevere*

The first suggestion is simple: Persevere. Many cases reach a point of apparent impasse, but it is only that—apparent. The disputants may be quite sincere, but the fact that a party has no intention of moving does not mean that it won't do so later. Most cases reach impasse at some point. You never find out whether agreement is possible unless you push to find out. Here is an example:

The dispute involved a Silicon Valley executive who sued his company after being fired. I continued to work even after each attorney told me privately that the case could not settle. Finally, at 9 p.m., the parties reached agreement. As I went over the terms the defendant's lawyer exclaimed, "They kept beating you up and you just kept going. You were like...like...the *Energizer Bunny!*"

At first, as a professional mediator, I found the idea of being compared to a drum-beating pink rodent a bit demeaning. But as I thought more about it, the comparison was apt. A commercial mediator's job is to keep advocating settlement until the parties tell him unequivocally to stop, and he sees no plausible way to change their minds.

## 2. *Restart the Bargaining*

### *Ask about interests, for a limited time*

The next suggestion is to try something that mediators are taught to do as a matter of course—probe for interest-based options. Stimulating interest-based bargaining is difficult in commercial mediation, however. Businesses, unlike warring neighbors, can usually find a new partner and by the time mediation occurs have often done so. Mediators who pursue interest-based options, especially a relationship repair, are often rebuffed ("If you knew them like we do, you'd understand that the idea of letting them back into our operation is out of the question!") Later, however, the same parties are sometimes more open to creative ideas, if only because their preferred option, a simple money deal, is not available.

If discussing interests leads to a settlement you are in luck. Keep in mind, however, that changing the subject can be helpful even when it yields no tangible result. Simply thinking for a few minutes about something other than the other side's obstinacy gives disputants a psychological breather, making them more flexible when they return to money bargaining. Someone who had earlier vowed to go no further may now be willing to do just that, because a break allows him to change course with less feeling of contradicting himself.

Commercial mediation is typically scheduled for only a single day, which creates time constraints on inventive bargaining. If parties spend hours looking at other options but hit a dead end, they often have little time or energy left to work out an agreement over money. To avoid this I may set a time limit (which can always be extended) on consideration of creative options.

*Example:* A condominium association sued several contractors over a leaking roof, demanding that the roof be entirely replaced at a cost of \$1.3 million. The case went to mediation. Six defendants argued vehemently that the roof could be repaired for no more than \$300,000.

Hearing this, I said to the defendants: "I suggest we think about whether you as a group can agree to repair and guarantee the roof. From what you tell me, that

might be a much lower-cost option. I'm aware, though, that Nancy has to leave for the airport at 4 pm, and she holds the largest checkbook. So I suggest we explore the repair option for the next hour and a half. If it doesn't work we can go back to putting together a money offer."

The defendants talked cooperatively for ninety minutes, but the initiative foundered over their unwillingness to guarantee the repair for ten years. We returned to talking about money—and within an hour the group raised their offer from \$200,000 to \$700,000. A month later the case settled at \$1.1 million.

### ***Push for linked moves***

As this example demonstrates, when creative discussions are not successful the other option is to continue pure-money bargaining. Parties are often more willing to make monetary concessions if they know what they will get in return. Mediators can provide this information by proposing linked moves.

*"What if"* The simplest way to feel out parties about reciprocal concessions is to ask "What if?," as in: "What if I could get them to come down \$200,000...if I *could* get that much movement, could you make a deal at that point?" or "Let's say I could get them to drop that far—what do you think you could do in response?" The "what if" phrasing suggests that the other side is resisting the idea of conceding, reducing the listener's tendency to devalue the potential concession. It also suggests that the adversary will have to make a concession first, satisfying a positional bargainer's wish to have its adversary "sweat for a deal."

*Simultaneous steps.* Another approach is to ask both sides to make concessions simultaneously ("I'm going to ask you to drop 200, and at the same time I'll ask the defendant to go up 150"). This plays on the human wish for reciprocity: Each party knows that it will not have to move without getting something in return, and also what the reply will be. If parties agree to make a large mutual jump, it can reinvigorate the bargaining process by giving each side a signal that the other is seriously interested in a deal.

*Range bargaining.* A variant on this is range bargaining. Here the mediator proposes that future bargaining will occur within a stated range of numbers. If parties are at, say, \$80,000 and \$200,000, a mediator might say "Can we agree that we will bargain from this point on between 120 and 150?" This is the practical equivalent of parties making simultaneous jumps, but it is sometimes psychologically easier for litigants to accept, because each side can tell itself that it has agreed only to go as far as the specific number and that most of the concessions from that point on will have to be made by the other.

*Parallel-track bargaining.* Parties are sometimes willing to indicate privately that they will compromise, but not to do so "publicly" to their opponent. The result can be a frustrating standoff, in which neither side is willing to be the first to make a serious concession. One way to deal with this is by conducting "hypothetical," or "parallel-track" bargaining.

A plaintiff is at \$3.5 million and a defendant at \$500,000. The defendant admits privately to you that it is willing to “go to the very low seven figures” to settle, but it won’t do so until the plaintiff gets to a “reasonable” position, and, it says, \$3.5 million is not it. You respond by asking, “What would you consider reasonable at this stage, given that you are at 500?” The defendant answers, “No more than \$2 million.” You then say “Assume for a moment that the plaintiff *is* at \$2 million. What offer would you be willing to make then?” The defendant answers “Then I’d go to 700.”

Now you ask the plaintiff the same questions: What would be a reasonable stance for the defendant to take at this point? (say the answer is “\$1 million”) How much would you come down if the defendant got to \$1 million? (“\$2.5 million”) The result is that you now have the defendant at \$700,000 and the plaintiff at \$2.5 million (admittedly, based on different assumptions about the bargaining situation).

You can then repeat the process, asking the defendant, “What would you expect the plaintiff to do in response to your \$700K?” (“1.5 million”) “What would you do if they did go there?” (“850K”) You can then pose the same questions to the plaintiff. Gradually, the parties will approach each other.

Lawyers are at first wary of parallel bargaining because it calls for them to make a concession without having actually received one from the other side. But they understand that the other party is working under the same ground rules, and if you seem confident about what you are doing they will often cooperate. As a result parties can come quite close to each other without knowing it. At that point you can ask each for permission to reveal their most recent offer and the assumption on which it was based, provided that the other side does so. Alternatively, you can use the information to support other approaches, such as a mediator’s proposal.

### **3. *Ask For Help, and Wait***

This suggestion should follow “persevere,” but I have delayed it because turning the initiative over to others seems counterintuitive to those of us who are active problem-solvers. I have found that when parties are stuck, one good option is to summarize the situation calmly and sympathetically, and then wait: Ask the disputants for ideas, and then observe how they respond. I have found, surprisingly, that when I do this disputants often take the initiative. Even when they don’t, sitting back for a moment gives me a mini-break; I learn something from their reaction, and can use the time to think about other options.

### **4. *Make a special plea***

*Personal request.* If linked moves are not successful you can sometimes obtain a concession by asking for it explicitly. (“If you could make one more move to help break

this deadlock, I'd appreciate it. I would tell the defense that you had been adamant, and only agreed to this because I asked you.”)

It is easier for a disputant to make an additional concession if it is portrayed as a special gesture to the mediator, because it appears to be a one-time move rather than the start down a slippery slope. This means, however, that the tactic will only work once or twice in a single mediation; repeated requests are likely to be met with “Why don't you ask *them* to be reasonable for a change?”

*Final move.* Parties will often agree to make an extra effort if they know that it is the last you will ask them to make and not simply a prelude to further compromise. (I'm going to ask you to go to \$1.1 million. That's my last request. If this doesn't work, it's over, and I'll tell the plaintiff that. I won't come back to you again.”)

This is a risky strategy, because you cannot go back on your word—if you say that you will not come back for more, you can't unless something truly unexpected happens. But a last-and-final plea will often produce an additional concession.

## 5. *Change the Process*

### *Modify the mix or structure*

Changing the participants or the structure will sometimes restart the process. The simplest is to experiment with the format. If caucusing is not working, would another format be more effective? Options include:

- *Disputants meet together*
- *Key decisionmakers meet apart (“only you can do this...”)*
- *Experts or lawyers meet (“professionals confer”)*
- *One person meets the opposing team (“into the lion's den”)*
- *Participants meet in an informal setting*
- *People are added to or subtracted from the process*

Any of these variations can unfreeze the process enough for parties to resume bargaining, and in unusual circumstances may resolve the controversy entirely.

*Disputants meet together.* In this option all the disputants are convened in what amounts to a new joint session (assuming, as is usually true in commercial mediation, that they have adjourned to separate caucus rooms). The purpose is not for each side to reargue its case. There may be a single issue which can be illuminated by a direct discussion.

Alternatively, you can assemble the disputants to deliver a message, for example that the process is in peril and that you plan to ask each of them for a special effort to avoid a breakdown. You could, of course, deliver the same message separately to each side, but calling a special meeting and saying it to everyone together makes it clear that the problem is real and no one is being singled out for blame. Laying out a situation in this

way can also serve as a springboard for challenging disputants to come up with ideas, either together or in caucuses—a version of Ask for Help and Wait.

*Key decisionmakers only.* In commercial disputes there is often a key decisionmaker for each party team. One option is to bring them together for a private conversation. The dynamic in these private meetings is often strikingly different than when adverse groups talk with each other. A direct meeting is likely to seem familiar and informal, much like a meeting outside litigation. Disputants chat, talk informally, and present at least an air of cooperativeness, particularly if they had a good relationship in the past. Lawyers often ask the mediator to be present at such meetings to assure that the discussion remains on a productive level or guarantee confidentiality, but principals can also meet alone.

Mediator Eric Green calls this the “Napoleon gambit,” because he often adds an implied message to the process: “Only you have the wisdom, breadth of vision, authority, and decisiveness to end this conflict. This case is a difficult one, but you can...” Disputants with sizable egos are likely to rise to the challenge and take it as a personal goal to achieve a deal.

A manufacturer was in a dispute with its insurer over the insurer’s refusal to pay huge claims arising from a mass-tort class action. The parties agreed to go to mediation. The insurer’s CEO prepped intensively for the process, planning to have a point-by-point discussion of policy coverage and other issues with representatives of the manufacturer.

When the parties convened in joint session and the insurer CEO tried to discuss the case, however, the manufacturer’s inside counsel said that he wasn’t interested. He had listened carefully to his litigation team’s analysis, he said, and saw no point in having a debate. The CEO was angry and frustrated by this, but at my request agreed to stick with the process. The parties adjourned into caucuses and negotiations went forward painfully.

The turning point came months later when the manufacturer’s counsel (the same lawyer who’d refused to debate with the CEO) asked me to invite the executive to meet him in the bar of the hotel where the mediation was being held. As a dozen lawyers and I sat around conference rooms, speculating on what might be going on, the two key players talked for over an hour and cut a deal.

*Experts or lawyers only.* Sub-meetings need not be limited to parties; you can also put experts such as accountants or product managers together. When experts talk with each other they tend to have the kind of conversation they are accustomed to in their daily work, often leading to a disagreement being narrowed or at least the cause becoming more clear.

Attorneys are experts on the litigation process. If the lawyers have a good working relationship, it can be helpful to bring them together. Freed of the need to posture in front of clients, they sometimes talk candidly, admitting to risks, hinting at client-relations issues, and suggesting solutions. You can achieve some of the same effect by talking to each lawyer alone, but direct discussion is usually more effective.

*One person meets the opposing team.* At times the people who need to hear something go beyond a single member of a team. If so you can ask one person to meet with the entire bargaining team for the other litigant. This has a “Daniel in the lion’s den” quality. The very act of going into the other caucus room without allies has symbolic impact, which may make the person’s message more credible.

A franchisor and franchisee were in a dispute over the franchisor’s alleged inability to deliver services and the franchisee’s failure to pay a \$60,000 quarterly fee. It became clear that any settlement would require continuing the franchise relationship. The franchisor, however, would not consider this, arguing that the franchisee was a deadbeat who had made up his allegations simply to avoid paying the fee. Asked about this, the lawyer for the franchisee explained that his client had been planning to make the payment and had only withheld it because the attorney told him to do so.

I knew that the opposing lawyers in the case respected each other, and so asked the franchisee and his attorney if the lawyer would be willing to go into the franchisor’s caucus room to explain why the payment had not been made. I suggested that the lawyer go in alone, so there would be less suspicion that he was simply protecting his client.

The lawyer went into the other caucus and explained that the franchisee had acted on his instructions. After talking privately the franchisor team told me that they thought the franchisee had gotten bad legal advice, but were less concerned about his good faith and were willing to consider restructuring the franchise.

*Meet in an informal setting.* Sometimes the key to breaking an impasse is to change the physical setting. Most commercial mediators work in conference rooms, but at times other settings can be effective because they make participants more comfortable or have positive connotations.

A doctor sued a high tech company, arguing that it had illegally diluted his interest in the company by issuing stock to new investors without his permission. There seemed to be a very personal element in the case: The doctor felt that he had played a crucial role in sponsoring the start-up and that its young CEO, a friend of his daughter, and had betrayed his trust. Settlement discussions reached an impasse and we adjourned.

With the defense’s assent, I suggested visiting the doctor at his home before work one day. He beamed as he showed me his porcelain collection and mementos of his medical achievements while his wife watched. Talking over coffee and grapefruit, the doctor talked about the dispute in a much more relaxed way, and a few days later we had a settlement.

*Add or subtract people.* It is sometimes useful to change the mix by adding people or taking them out of the process. It is usually easier to add players than subtract them; suggesting that a participant leave is often interpreted as a judgment that he is being unreasonable or, if made by an opponent, as an effort to “push us around.” It is sometimes possible to eliminate a problem player indirectly, however, for example by suggesting that both sides bring in someone from a higher level (“Perhaps if we could get the plaintiff to bring in its CFO and you did too, we could explain your thinking on damages...”)

### ***Offer an opinion***

At this point in the process the participants should have enough trust in you, and enough frustration with the results of their approach to the conflict, to accept advice. Consider offering some, or sharpening advice that you have already given. Opinions can cover at least three separate topics:

- What offer to make next
- Whether particular settlement terms satisfy a disputant’s broader interests
- The likely outcome if the case is adjudicated

The first option is to offer advice about the bargaining situation—what is necessary to move the process forward. This is the least risky opinion to offer because you are unlikely to be blamed even if your advice is unwelcome: You are simply confirming, after all, what the listener has known from the outset—that its adversary is unreasonable. Parties may still refuse to move, however, complaining for example that “It’s time for *them* to get realistic!” If so you can sometimes jump-start the bargaining by suggesting linked moves as described above.

Another option is to offer an opinion about the value of an offer, either in terms of a party’s broader interests (“Given what you’ve told me about wanting to put this behind you,...”) or the party’s litigation alternative (“In light of what I know of Judge Jones’ attitude toward discrimination cases...”)

Before evaluating the litigation outcome, however focus on the cost of continuing the litigation. Parties may not welcome a reminder of how much it will cost to achieve “justice,” but they should by this point in the mediation be willing to take account of it. If drawing attention to costs is not enough, and you have not yet given either side a “hard” evaluation of the legal merits, this may be the time to do so.

How to evaluate effectively is a topic in itself. Briefly, however, the key is *not* to give your *personal* opinion of who is likely to win (which, after all, is irrelevant because you will never decide the case). Rather, think of yourself as a legal meteorologist, forecasting the weather in a future courtroom. You may predict a seventy per cent chance of bad weather, but it is not because you personally prefer rain—it’s simply the way you read the evidentiary barometer. You can:

- Evaluate more of the case, for example, going past stating a view about a single issue to give an opinion about a party’s overall chance of winning.
- Make an opinion more definite, as by replacing a characterization such as “you’ll have difficulty winning on liability” with “Given Judge Smith’s rulings in IP



cases I think you have a 30 to 40 per cent likelihood of prevailing on liability at trial.”

- Set a specific monetary value on the case (“probably a \$150,000 to \$200,000 case, in this county”).
- Make your evaluation more forceful by putting it in writing (but be careful about embarrassing a participant).

#### **4. *Manage the End Game***

##### ***Play confidential listener***

Toward the end of a process you can probe for the parties’ bottom lines. One way to do this is to play “confidential listener.” This involves asking each side privately how far it will go to get an agreement, then giving all parties a verbal characterization of the gap. This allows parties to give the mediator and each other a signal about their willingness to compromise, without having to make a specific concession. Effectively applied, the confidential listener tactic can give both you and the disputants a clearer sense of each side’s actual goal.

Don’t ask disputants for their last-and-final number. Parties almost never give it and such requests put them under pressure to mislead you. Worse yet, if a party does answer sincerely it may feel that it has to stick with the number for the sake of consistency, even if later it becomes willing to stretch further. You are likely to get more candid answers if the parties fear failure from seriously gaming the process. It makes sense, therefore, to wait until disputants are close to impasse and to characterize the technique as one of the last things you can do to find a solution. I would introduce the option in this way:

“Your offers are a million dollars apart, but I think you are in fact much closer than that. Let me try something I call ‘confidential listener.’ I’ll ask each of you to give me what I’ll call your ‘next-to-last number’—a number one step away from the lowest you’d accept or the most you’d pay to settle this case.

“I won’t reveal either side’s number to the other, or give you a number answer on how far apart you are; if I did that, each side could calculate what the other party’s number was. Instead I’ll call the lawyers together and give a verbal statement of how far apart you are, such as ‘very close’ or ‘far apart.’ That keeps anyone from being locked in. I’ll be back in a few minutes to ask for your number.”

Once you have gotten the parties’ numbers you can give them a characterization of the gap between them. For example:

- “The gap is substantial, but I think it can be bridged.”
- “You are closer than the cost for each of you to litigate this case through trial, so it’s worth continuing to talk.”
- “You are very far apart. Unless someone changes their view of what the case is worth in court, it’ll be hard for you to agree. Should we consider getting an expert opinion?”

After giving verbal feedback you have an additional option, which is to ask each side for permission to reveal its number to the other on a mutual basis. (“I’m going to ask both sides if you would agree to let me disclose your number to the other side, on the condition that they authorize me to tell you theirs.”)

### *Offer a mediator’s proposal*

Under a mediator’s proposal, the neutral suggests a set of terms to both parties to which they must respond under the following ground rules:

- Each litigant must tell you privately whether or not she would agree to the proposal assuming that the other side has done so as well.
- The terms must be accepted or rejected unconditionally; in other words, no “nibbling.” For example, “We’ll accept, but the warranty has to be three years, not two” would be treated as a rejection.
- Each side must answer but without knowing the other’s reply. If a party rejects a proposal it will never learn whether its opponent would have accepted it.
- Usually each side will answer within 5 to 20 minutes. However, if accepting would require a party to go beyond its authority you may need to set a response deadline for the next day or several days later. If one side asks for repeated extensions there is sometimes a problem: It becomes apparent that the other side has said yes—otherwise why would you extend the process?

Parties thus know that they may be able to achieve complete peace by saying yes to a mediator’s proposal, but that if the effort fails the other side will never learn of their willingness to compromise and their bargaining position will not be impaired. My practice is usually to require both sides to answer even if one side quickly rejects the proposal; my thinking is, first, that these are the ground rules, and second, that it is useful for parties at impasse to think hard about how far they will go to get a deal.

Many mediators avoid this technique, perhaps because it involves presenting terms on a take-it-or-leave-it basis and thus taking over the bargaining process. My sense, however, is that parties often reach a point at which they want me to take over responsibility. Doing so relieves them of the “water torture” of positional bargaining, in which they have to make one painful concession after another without knowing whether it will get them a deal. It also allows parties who expect to be second-guessed by outsiders to use the mediator as a convenient scapegoat. (“This lousy compromise wasn’t our idea, it was the mediator’s.”) I find that mediator’s proposals are successful at least two-thirds of the time.

If you decide to make a proposal, how should you decide what the terms will be? My proposals do not reflect an evaluation of the parties’ legal cases and I tell them that. (Doing so also reduces the risk that a party will feel that I have ruled against them on the merits.) I am likely to say:

“In framing the proposal my goal is not to please either side. I could suggest terms that you would be very happy with, but it would be a waste of time because the other side would reject them. For the same reason, I can guarantee that my proposal won’t make them happy either. I’m afraid that we’re at the point where any proposal has to balance the pain each side will feel in accepting it. My goal is

to find a set of terms that both parties will decide, however reluctantly, is better for them than litigating the case through trial.”

*If a proposal fails.* Assume that the parties have rejected your mediator’s proposal. Is this the end of the road? No. You can ask the rejecting party to take the initiative (“I understand that you can’t accept my proposal, but what do you need to make it minimally acceptable?”) Parties usually reply by giving a new number that often falls between your proposal and their last offer (“We won’t go to 500, but we could go to 400”) You can then ask to present the party’s new number to the other side (“Can I tell them that you’d settle if they would go there?”) Often a party that had refused to make any further concessions will now agree to put forth a new offer.

It may seem strange that a party would offer compromises beyond its announced bottom line. This may be due to what is called the “contrast principle”: A further concession may look good, compared to the “unacceptable” proposal you have made. Or it may be that a party who has rejected a proposal feels that it should make a gesture to preserve its relationship with the mediator. Or the fact that the other side has rejected a mediator’s proposal may convince a party that it must go the “last mile” or face failure. Whatever the motivation, the failure of a mediator’s proposal often sets the stage for new offers that had been unavailable before.

*Successive proposals.* It is sometimes possible to make two mediator’s proposals.

A plaintiff is adamant that the defendant, if pushed hard enough, will pay \$150,000 to settle a case. You privately think that the defendant will reject that number, but the plaintiff believes that it will, and as long as he does will not consider settling for less. You therefore make a proposal to both sides at 150. The plaintiff accepts but the defendant immediately turns it down.

You can then meet with the plaintiff team and say: “I made the proposal at 150, to hold their feet to the fire and see if they were bluffing. But they’ve turned it down flatly. They just won’t go there. I think we now have to consider a different strategy. I’m willing to keep looking for a deal, or even make another proposal, but it’d have to be at a lower number. Sticking with 150 would just be beating our heads against a wall. What do you think we should do?”

### ***Challenge the parties***

If all these techniques fail, you can once again challenge the parties to take the initiative. Simply asking the parties for ideas as described above is a gentle challenge, but you can also pose a question more bluntly (“It looks like we have a real problem here. We may be at the end of the road. What do you want to do next?”) And wait....

## **6. *Adjourn and try again***

Mediation often requires parties to accept deals much worse than they had expected going into the process and litigants sometimes cannot quickly adjust to the resulting

feelings of loss. Even when emotions do not block a decision there may be other problems: A party may not have enough authority to settle, or may feel the need to confer with a constituency to shield itself from after-the-fact criticism. Some forms of mediation occur over a series of sessions, which provide breaks to deal with such issues. Commercial mediations, however, are typically scheduled for a concentrated time period, usually a single day, which leaves little time for adjustment and consultation.

Adjournment, of course, carries dangers. Parties make difficult concessions in part because they hope to achieve peace. Once they leave there is a risk that they will become discouraged or decide that they have gone too far. In practice, however, this does not seem to happen; I have rarely seen a commercial mediation fall apart because of an adjournment. If there is failure it is usually because an impasse that existed at mediation cannot be overcome, not because anyone backpedaled or gave up.

Indeed, commercial mediations increasingly seem to require more than a single day. When the process cannot be completed within the originally scheduled time, you have these options:

- Arrange a status call
- Schedule another meeting
- Conduct shuttle diplomacy by telephone
- Lead a “time block” session by telephone
- Pursue the disputants
- Set a final deadline

*Arrange status calls.* The easiest option is to ask lawyers to participate in a status call (“Let’s agree that I’ll call each of the lawyers on Wednesday morning to talk about next steps.”) Agreeing to status call does not commit people to make decisions or guarantee an interactive process, but it does give you a chance to gather information and then propose a structure for further discussions.

I find that it is almost always better to talk with each side privately, rather than have a joint call. A private call permits disputants to give more honest information about obstacles and to signal flexibility without hurting their bargaining position. The key point is to create a timeframe and expectation of further discussion.

*Schedule another meeting.* The next option is to set up another meeting. Before suggesting one, ask yourself these questions:

- Are all of the parties ready to move forward? Does a litigant need more time to calm down, or do the parties need to do additional investigation?
- If there is another meeting, how should it be structured? In particular, can the process be set up in a way that makes it less likely that it will simply repeat the last session?

I often make some of the following points when proposing another meeting:

- Since each side has already argued their case, it will not be necessary to hold a second opening session. (This is usually greeted with expressions of relief.) It

may make sense, however, for the parties to meet jointly for a specific purpose, such as to hear a defendant's critique of the plaintiff's damage analysis.

- There is usually no need to commit to another full day. (Indeed doing so may give the signal that the parties are still far from a settlement and should wait to make their final concessions.) Given the progress made so far, two to four hours should be enough for a follow-up session. I often suggest that we agree to meet after lunch, or to go only until noon. (Setting a short timeframe does not mean that the process cannot continue longer and often it does. Doing so does signal that the process is moving toward closure and that disputants should come prepared to make hard decisions.)
- I may go further, emphasizing that it is time to “cut to the chase” and that I expect everyone to be ready to make final decisions at the session.

*Use telephone and email diplomacy.* Often it is not possible to schedule another meeting quickly. Disputants may have flown in for the first meeting and are not willing to return for another one, or need time to confer or gather data. Luckily there is usually less need to meet in person a second time because you have developed a working relationship with the disputants. Once a session has been held it is much easier to carry on follow-up discussions by telephone or email.

Electronic communication has disadvantages, of course. Over the telephone participants cannot see each other's body language and with email cannot hear each other's voices. With email in particular, there is a particular danger that messages will seem harsh because they are in writing and have no body language or tone of voice to soften their impact. The biggest disadvantage of electronic communication may be the loss of focus and continuity—people drop a case and then pick it up again, often reading a message or taking a call when they are distracted by other matters.

*Conduct a time-block telephone session.* One way to inject focus into a process conducted electronically is to set up “time-block mediation.” In this format disputants agree that during a certain time period, say from 2 to 5 pm one afternoon, all the attorneys and decisionmakers will be at a telephone or computer, ready to receive a call or email from you. They may work on other matters, but will interrupt it to respond to your calls or messages. You can then conduct shuttle diplomacy. The advantage of time-block mediation is that it is less subject to interruption and the time limit motivates the parties to make hard choices.

*Pursue them.* Remember that one of the traits lawyers report that they most value about mediators is persistence. The time to follow up and willingness to plug on may be a key advantage that a new mediator has over “star neutrals” who go on to a new case every day. Even if the parties do not agree to a follow-up process, call the lawyers on your own initiative within a few days of an unsuccessful session to ask their thoughts and sound them out about next steps. Almost no attorney resents such a call.

Remember that you are the guardian of optimism about the process. Disputants tend to assume the worst, and look to you for signals about whether it is worth continuing. Unless you have no realistic hope for the process, keep a positive tone.

*Set a final deadline.* The only thing that will motivate some people to make difficult decisions is a firm deadline. You can create one by setting a time at which you will declare the mediation over and stop acting as mediator. The parties can continue to negotiate alone, of course, but the implicit message is, “If you have not been able to reach agreement with assistance, why should you think you will be able to do so by yourselves? And if you don’t settle, is your litigation alternative really as rosy as you have been claiming?” A polite warning that you will end the process can cut through posturing and put pressure on the parties to make additional efforts. To avoid making disputants feel that you are pushing them around, stress that you are not setting the deadline to coerce anyone, but simply are recognizing the reality of the situation—at some point everyone has to make decisions and move on.

Apparent impasses in commercial mediation are nearly inevitable, but they need not be final. With these and other techniques—and persistence—you can bring even the most stubborn cases to closure.