

## GETTING PAST IMPASSE TIPS

1. **Start gently and with generalities** - don't get too specific too early. Use your active listening skills and build into problem-solving. For example: *"So it sounds like you need a redefinition of your job and a fresh start. Is that something you want to pursue here?"* At the beginning of problem-solving, you are still in the mode of listening much and saying little.
2. As you begin to get into problem-solving, look for opportunities to **emphasize the future and de-emphasize the past**. This provides a nice transition into more active problem-solving, and allows the parties to recognize and affirm the change. Examples (in ascending order of directiveness):
  - At some convenient point, perhaps after a break, say something like: *"We've spent a lot of time exploring where you are and how you got here, and that's important to help me - and you as well - understand what the problems and concerns are. I'd like to suggest we now begin to focus on the future: Where you'd like to be six months from now and how we can get there. Is that OK with you?"*
  - If one or both parties seem stuck in the past like a broken record, try being a little more directive (first, of course, do a "self-check" to make sure your party feels heard). You might pause, and say something like: *"It's clear to me how strongly you feel about what happened here. I think I've got a pretty good understanding of the problem. At this point in the mediation, I'd like to suggest that we kind of change direction and commit to finding ways to solve the problem. And what this means is that we'll need to keep focused on the future - not the past. That may not always be easy. Would you like to try it this way?"*
  - If a party commits in principle to "the future" but continues reflexively to wallow in the past, you might remind him/her of the agreement, and suggest a "ground rule" that will allow you to bring them back to the future.
3. **Follow the parties**. It's their dispute, and your job is to help them negotiate and communicate, not develop a solution for them. If you find yourself frustrated because the parties don't seem to be going in the direction you think would be best, there's a good chance you shouldn't be trying to go there.
4. Remember that (a) parties will resist moving to closure too fast, and (b) parties faced with a settlement option reasonably may display discomfort about details and the unknown, although the core idea is good. Therefore, use the "in principle" technique, by saying something like: *"Now I know there's a lot of important considerations and details to work through, but IN PRINCIPLE, if you could get a good job in the other division, do you think that might work for you?"*
5. Also, resolve issues involving complex details "in principle" and move on. For example, the parties might agree in principle that an employer will issue a reference letter to be attached to the settlement agreement; you can come back to the exact wording of the letter later.

6. Help the parties **convert their statements** of interests and their ideas, and even their objections, into things that you can work with. To do this, look for opportunities to use transformations like the following:

- “*Would you like to propose that idea as a solution?*” or “*can I take that to [other party] as an offer?*”
- “*So you would like [ x ]. Is there a way we can develop that into a plan?*” or “*How can you get from here to there?*”

7. An **easel or blackboard** is a powerful tool - a way to display information and options visually, get the parties focusing together on the same “page,” and let you organize how information is translated and displayed.

8. Where there's an absence of ideas, consider using “**brainstorming**” (in caucus or joint session). This means the parties are encouraged to suggest as many ideas as they can create, without any criticism or interruption; later, they return to the ideas and eliminate or develop them.

9. Help a party find ways to deal with his/her discomfort or caution in reacting to a proposal by saying something like “*I see that the proposal doesn't appear to meet your needs, but let me ask, what would it take to make that proposal into something you could accept?*”

10. Use the opposite of 9 above to help a party reality-check his/her own idea: “*What do you think it would take for [other party] to accept your proposal?*”

11. Hypothetical scenarios are a non-threatening and non-coercive way for you to introduce ideas for parties to consider, and can be an entry to brainstorming. The classic hypothetical is the “**what if.**” Say something like, “*I'm just wondering - what if they were to provide a retroactive QSI - might that be an option in lieu of promotion to meet them half-way?*” Be careful not to so overuse “what ifs” that the parties stop being creative themselves and look only to you.

12. A party may be anxious about displaying an offer in development to the other side, but it would be nice to know whether it's possible. You can ask if it's OK for you to take implied ownership of the idea and test it with the other party, e.g., “*I have an option that I'd like to float for consideration; what if . . .*”

13. Particularly in cases where the issue is money and valuation is imprecise, parties may be anxious about “going first.” You might offer both parties the opportunity to have you simultaneously disclose a mid-point or range between them. This may also be more appropriate for discussion in caucus.

14. Where there is a substantial difference between the parties' demands (or lack of clarity about valuation), try "**decision analysis**." Although details of this technique are beyond the scope of this list of tips, briefly it works this way: In caucus, emphasizing confidentiality, you work with each party to develop "best case" and "worst case" scenarios, both in terms of dollar valuations and percentage likelihood of outcomes on motions for summary judgment, etc. These extremes will bracket reality. Generally, the analysis will cause the parties' positional demands to move toward each other, sometimes quite substantially. Then, discuss with the parties how they would like you to use the information you've developed (for example, by disclosing overlapping valuations or a mid-point). Helping the parties see the issues from the perspective of a timeline may also help to focus the discussion on the areas for which a monetary solution is appropriate. Considerations such as duration, frequency, and severity are important factors in developing a mutually understood valuation of the case.

15. **Precedents:** Sometimes, one party (typically an employer) will be concerned about setting a precedent. Some options to explore: a clause specifying the agreement's non-precedential nature; a confidential agreement; narrowing/isolating/removing a particular issue from the agreement; writing the agreement to make the case unique; reality-testing to see if a precedent is really such a big deal; contrasting the risk of no agreement.

16. Psychologists say that people tend to react negatively to any offer or information presented by an adversary ("reactive devaluation"). Couple this with "selective perception" (the tendency to screen out data which does not fit preconceived views) and you can see why disputants need mediators. You, as the trusted neutral, can carry exactly the same messages without the same negative burden. In practical terms, this means you can introduce and reexamine ideas that the parties on their own have rejected.

17. Impatience is always your enemy. In fact, as you grow more experienced as a mediator and become more able to predict outcomes, impatience becomes an ever more subtle enemy. Be on guard.

18. The overall mediation should be a "**settlement event**," meaning that everyone should develop the expectation that they've come to work on resolving the matter and that it *can* happen. During problem-solving, reinforce the psychology of the "settlement event" by keeping the momentum going, keeping things positive, reminding them of the time constraints, focusing them on the investment of their time thus far, and reinforcing the agreements so far. The parties will begin to believe a settlement should and will happen, which is powerful motivation for resolution.