Anatomy of a Mediation

Although each mediator designs his or her own procedures, most follow a pattern something like the following. After picking a mutually agreed time and place for the mediation (often the place is a neutral site provided by the mediator), the parties provide background information about the case and their settlement positions to the mediator. That information may be provided in mediation briefs (with important exhibits), through telephone or personal conferences with counsel and the parties, or some combination of these approaches. Most mediators require the parties and counsel to execute a formal mediation agreement prior to commencing the mediation. Compensated mediators may require a nonrefundable "administrative fee" and may require some or all of the anticipated costs of mediation to be paid in advance.

The mediation itself usually begins with a joint session in which the mediator explains the process to the parties and counsel and answers any questions the participants may have. In addition, the mediator uses the joint session to get everyone's commitment to the ground rules of the process and to gather any needed background information not contained in the parties' submissions (and not better left to the confidential caucuses). Some mediators then ask the attorneys to make opening statements, similar to the opening statements the attorneys would make at the outset of a trial. Other mediators find that opening statements by counsel tend to polarize the proceedings unnecessarily. Thus, those mediators may simply ask the parties to exchange their mediation briefs, or the mediator may use the joint sessions to ask specific questions of the attorneys about their arguments and the evidence each anticipates introducing in support of particular claims and defenses. Finally, I like to conclude the joint session by giving the parties, as opposed to counsel, the opportunity to say anything they would like in the presence of the other party. With only a couple of exceptions, I have found these statements by the parties to be constructive and informative, although most parties decline the invitation to speak.

Following these preliminaries, most mediators separate the parties into caucuses, and the mediator goes back and forth between the two (or more) rooms of participants. What occurs in caucus is confidential, i.e. the mediator does not disclose it to the other side unless specifically authorized to do so. The mediator assists the parties in thinking through their options and in formulating settlement proposals to be communicated to the other side. During that process, the mediator is usually looking for interests and goals that are "shared" or "independent" rather than "conflicting." In other words, rather than simply being a messenger in a game of "positional bargaining," the mediator tries to "add value" by building upon those things the parties have in common and those that matter deeply to one side but not at all (or not very much) to the other. To the extent the bargaining is "positional," the mediator assists each party in evaluating the "messages" being sent by the other side in its bargaining positions and—perhaps more importantly—in evaluating the "messages" the other side might read into its proposals.

Through this process, the parties often find a mutually acceptable resolution. Sometimes, however, they reach impasse even though they are not very far apart. When the parties are close to an agreement, the mediator may help to bridge the gap and break the impasse by making a mediator's proposal or recommendation. Each party is then free to accept or reject the recommendation, usually communicating its answer directly to the mediator without knowing whether the other party will agree. It is also possible for the parties to give the mediator the authority to pick the "appropriate" settlement amount within the range of the parties' bargaining positions. On occasion, parties engage in "baseball" mediation at this stage—i.e., they each write down a number they are willing to settle for and the mediator writes down his or her evaluation of the "appropriate" figure independently. All of the envelopes are then opened in a reconvened joint session, and the number of the party closer to the mediator's number is the final settlement amount.

The important point here is that "impasse"—which usually signals the end of (or at least a long delay in) unassisted bargaining—need not end mediated negotiations. The presence of a neutral to suggest substantive and/or procedural alternatives can lead to continued negotiations that would not occur in the context of ordinary bargaining. A caution, however: once the mediator moves to this more active participation in the substance of the appropriate settlement, he or she can rarely return to the more usual role of mediator as neutral "facilitator." Therefore, it is critical that the mediator resist moving into one of these roles until it is clear that the more usual approaches have run their course.