

June 30, 2008

The Question

I have a question about the ethics of two impasse avoidance techniques used by some mediators, one, called either the “silver bullet” or “baseball”, and the other, called “the mediator’s offer”. The techniques are used after substantial (positional) negotiation by the parties have not led to a mediated settlement.

In the Silver Bullet (or Baseball), the mediator tells both the sides that they are about done, but that, before they quit and go home, if both sides are willing, they can each privately reveal a bottom line to the mediator (which may never be disclosed to the other side), and the mediator will then look at the two final numbers in private. If the numbers overlap, he splits the difference and the case is over and settled. If the numbers are close, the mediator tells them they are close and should try harder because it's too close to quit. If the numbers are too far apart, the mediator simply tells them that and then calls an impasse.

In the Mediator’s Offer, the mediator in caucus asks a party in caucus whether, if the opposing party would be willing to agree to a particular number, would they be willing to accept it? The mediator explains that s/he will go into the other caucus room and ask the same question of the other party and, if the answer is positive in the other room, that there will be a deal at that number. If the party says yes, and agrees to accept that number if the other party would agree to it, then the mediator goes into the other room and poses the same question. If the answer is yes from the other party, the mediator announces (to both parties) that there is a deal at that number. Note: the mediator picks the number from his/her own judgment of somewhere between where the parties are, often the midpoint of the parties’ last offers, but not always.

Please opine on the ethical propriety of these impasse avoidance techniques and, if the techniques are acceptable, what ethical concerns the mediator should especially keep in mind when employing the techniques.

Submitted by Certified County and Circuit Mediator
Central Division

Authorities Referenced

Rules 10.210, 10.220, 10.310(a), 10.330(a), 10.370(a) and (c), 10.420(b), Rules for Certified and Court-Appointed Mediators.

Committee Notes to Rule 10.370.

Summary

While the MEAC is unable to state that the above-described impasse avoidance techniques are per se ethical, it acknowledges that the techniques may at times be ethically utilized by a mediator. Any mediator choosing to proceed with either approach must do so only after first considering the various limiting provisions in the rules and the totality of the circumstances.

Opinion

Given the importance of the specific circumstances surrounding the use of any given technique, the MEAC is unable to state that any technique is per se appropriate and ethical. For example, asking questions is generally considered an appropriate mediation technique. However, in MEAC 95-002, the Committee noted that questions designed to “advise the party about her legal options” and questions containing inaccurate information which are therefore false and misleading, are not ethically appropriate for a mediator. Therefore, before a mediator uses these or any other impasse avoidance techniques, the MEAC suggests careful consideration of the following analysis.

In order to be ethically appropriate, a mediator must employ any impasse avoidance technique consistent with the requirements of impartiality under Rule 10.330(a). Equally important, a mediator must protect the right of willing, fully-informed parties to decide all substantive matters before them. Rule 10.310(a). Beyond these threshold provisions in the Florida Rules for Certified and Court-Appointed Mediators, the Committee further cautions the inquiring mediator to consider various other limiting provisions in the rules, as well as timing and circumstances specific to any given mediation, prior to employing either technique.

Looking first at rule provisions supporting the mediator’s use of these impasse avoidance techniques, mediation is, by definition, “a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be.” Rule 10.210. By its own terms, this definition casts the mediator in a proactive role, not simply encouraging, but acting in a manner potentially facilitating, agreement between the parties. More explicitly, the mediator’s role “is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements.” Rule 10.220.

Though anticipating the mediator's active involvement, the rules are also explicit with respect to various limiting provisions. As noted above, mediators impermissibly cross the line if they fail to protect a party's right to self-determination or abandon their obligation to maintain impartiality. Specifically, "decisions made during a mediation are to be made *by the parties*" with the mediator protecting their right to self-determination and "assisting [them] in reaching *informed and voluntary decisions*." Rule 10.310(a) (emphasis added). The definition of mediation itself circumscribes the role of the mediator, explicitly providing a mediator may not prescribe *how* a dispute is to be resolved. Rule 10.210. Similarly limiting in its effect, Rule 10.330(a) requires mediators to maintain impartiality throughout the process and assist *all* parties as opposed to any one individual.

As impasse is frequently preceded by one party's expressed reluctance to continue the mediation absent substantial positional change by the other, the mediator must proceed carefully when using any impasse avoidance technique in order to avoid the appearance that the mediator is simply accommodating the party who has threatened to abandon the process. Timing is critical in other respects. Used too soon, the parties will have little opportunity to tell their respective stories and put forward their own proposals. If too late, one or both parties may already have decided to end the mediation, rendering the party/parties unwilling to participate meaningfully in the process. At that point, the mediator must carefully inquire regarding their continued willingness to decide substantive matters necessary to reach a voluntary agreement. Rule 10.420(b).

In the so-called "silver bullet" or "baseball," the inquiring mediator describes circumstances in which the parties agree in advance to provide "bottom line" numbers to the mediator. If the bottom line numbers overlap, the mediator simply "splits the difference and the case is over and settled." Describing numbers too far apart, the inquiring mediator states "the mediator tells them that and then calls an impasse." Similarly, in the "mediator's offer," the process ends with the mediator announcing to both parties "there is a deal" at the number separately agreed to in caucus. The MEAC cautions the mediator to be careful with words. No case is "over and settled," "there is [no] deal," and no mediation ends in an impasse simply because the mediator says so. On the contrary, the mediator must always bring back to both parties the status of the negotiation and advise them the decision to accept, reject, continue, or end the mediation remains theirs and theirs alone.

Describing the "mediator's offer," the inquiring mediator states "the mediator picks the number from his/her own judgment." This is, no doubt, where the name of this technique originates. The MEAC believes use of the term itself is ill-advised, particularly as the technique appears to result in an announcement to the parties, rather than a subsequent confirming decision by the parties themselves. Rule 10.370(a) provides a mediator *may* supply information he or she is qualified by training or experience to provide, but must do so consistent with standards of impartiality and party self-determination. Similarly, a mediator may *not* offer "a

personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue.” Rule 10.370(c). Moreover, the Committee Notes to Rule 10.370 provide “parties [supplied such information] must be given the opportunity to freely decide upon any agreement.” In practical terms, these limiting provisions mean the mediator may suggest potential resolutions, but may neither make an offer nor announce an agreement not affirmatively decided upon by the parties.

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Date

Fran Tetunic, Committee Chair