**The Ethics of Breaking Impasse**

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**MEAC 2008-004 Analysis**

Before a mediator uses these or any other impasse avoidance techniques, the MEAC suggests careful consideration of the following analysis:

**Threshold provisions**

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| 1. A mediator must employ any impasse avoidance technique consistent with the requirements of impartiality under Rule 10.330(a).
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| 1. A mediator must protect the right of willing, fully-informed parties to decide all substantive matters before them. Rule 10.310(a).
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| **Various limiting provisions in the rules** | **Totality of the Circumstances** |
| Provisions supporting the mediator’s use of these impasse avoidance techniques:1. 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.

a) 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.1. 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
 | Consider the timing and circumstances specific to any given mediation.A Totality of the Circumstances means making decisions are based on all available information rather than bright-line rules.CircumstancesAs 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. |
| Various limiting provisions.1. 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).
2. 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.
3. 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.
 | Timing is critical in other respects.1. Used too soon, the parties will have little opportunity to tell their respective stories and put forward their own proposals.
2. 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). |

1. While the MEAC is unable to state that the described impasse avoidance techniques are per se ethical, it acknowledges that the techniques may at times be ethically utilized by a mediator.
2. 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.

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| “Silver bullet” or “Baseball” A 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.” The process ends with the mediator announcing to both parties “there is a deal” at the number separately agreed to in caucus. 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. |
| “Mediator’s offer” “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. |