

The Ethics of Breaking Impasse

BRIAN GRUBER / LLOYD COMITER



The Ethics of Breaking Impasse

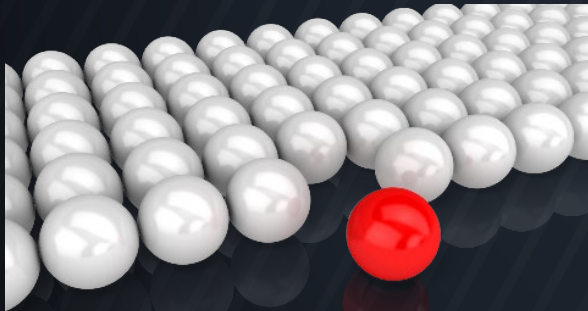
BRIAN GRUBER / LLOYD COMITER

Brian Gruber Lloyd Comiter

MEDIATION ETHICS INVOLVED WITH BREAKING AN IMPASSE

Examine Mediation Ethics Advisory Committee Opinions regarding Breaking an Impasse, Coercion, Impartiality and Exploring Settlement Alternatives.

Need Two Volunteers!



OTHER RULES TO CONSIDER BEFORE BREAKING IMPASSE

Examine other Rules supporting a Mediator's use of Impasse Techniques and the Various Limiting Provisions on those Rules.



Brian Gruber & Lloyd Comiter

DISCUSS BREAKING IMPASSE TOOLS

AKA What to do when things aren't going well.
Discussion regarding most common Impasse Avoidance Techniques and how a mediator can use those ethical rules as guidance to best select the tools while preserving the mediation participants right to self-determination.



QUESTION / ANSWER

Question and Answer Session with both presenters:
Time permitting.





Fla. Stat. § 44.1011 (2). Definitions.

“Mediation” means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties.

It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement.

In mediation, decision making authority rests with the parties.

The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.



10.210, Florida Rules for Certified and Court-Appointed Mediators.

Mediation defined. Mediation is 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. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.

10.220, Florida Rules for Certified and Court-Appointed Mediators.

Mediator's Role. The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute. The ultimate decision-making authority, however, rests solely with the parties.





Statler and Waldorf are characters created by Jim Henson, owned by the Walt Disney Company.

A mediator may discuss and “explore settlement alternatives” with the parties for their consideration in accordance with the role of the mediator as defined in Rule 10.220 as long as the activities by which the mediator does so is consistent with Rules 10.310 (**Self-Determination**) and 10.330 (**Impartially**) and does not violate Rule 10.370 (**Advice, Opinions or Information**).

MEAC Opinion 2010-006.



Respecting Impartiality. Rule 10.330.

Rule 10.330 Impartiality.

(a) Generally. A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual.



Respecting Self-Determination of the parties. Rule 10.310.

Respecting Self-Determination of the Parties.



DECISION MAKING. Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination. Rule 10.310 (a).

It is critical that the parties' right to self-determination (a free and informed choice to agree or not to agree) is preserved during all phases of mediation. Committee Notes 10.310.

COERCION PROHIBITED. A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation. Rule 10.310 (b).

A mediator must not substitute the judgment of the mediator for the judgment of the parties, coerce or compel a party to make a decision, knowingly allow a participant to make a decision based on misrepresented facts or circumstances, or in any other way impair or interfere with the parties' right of self-determination. **Committee Notes. 2000 Revision.**



1



2



3



4

Rule 10.310, Self-Determination Florida Rules for Certified
and Court-Appointed Mediators. Committee Notes, 2000 Revision

While mediation techniques and practice styles may vary from mediator to mediator and mediation to mediation, a line is crossed, and ethical standards are violated when any conduct of the mediator serves to compromise the parties' basic right to agree or not to agree. Special care should be taken to preserve the party's right to self-determination if the mediator provides input to the mediation process. See Rule 10.370.

Rule 10.370, Self-Determination, Florida Rules for Certified and Court-Appointed Mediators.

(a) **Providing Information.** Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.

(b) **Independent Legal Advice.** When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.

(c) **Personal or Professional Opinion.** A mediator shall 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. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

Ethical guidelines are crossed when a mediator offers "a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of "any issue."

MEAC Opinion 2017-011



October 12, 2010

The Question

I have two questions regarding the application of Rules 10.220 and 10.370(c) in the course of conducting court-ordered small claims mediation.

Rule 10.220 states that one of the roles of a mediator is to “assist in the identification of issues and exploration of alternatives.” Rule 10.370 (c) states, in part, that “a mediator shall 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.”

Question One: Does this Rule 10.220 give the mediator the ability to suggest with specificity *[emphasis added]* possible settlement alternatives or is the offering of suggesting settlement alternatives a violation of Rule 10.370(c)? It should be noted that the elements of settlement alternatives were not raised by either party, but were solely those raised by the mediator.

Question Two: Would your response depend on whether the suggestions were made by the mediator during caucus?

Your opinion would be greatly appreciated.

Certified County and Family Mediator
Northern Division

MEAC Opinion 2010-006.

A mediator may discuss and “explore settlement alternatives” with the parties as long as the activities by which the mediator does so is consistent with the Rules for Certified and Court-Appointed Mediators.

Examples from 2010-006.

MEAC EXAMPLES

OPTION “A”

“You should consider [specific settlement alternative] as the best alternative presented here today”

OPTION “B”

“Have you considered the possibility of [specific settlement alternative] as meeting the needs and objectives that you are seeking?”

MEAC Opinion 2010-006.

A mediator may discuss and “explore settlement alternatives” with the parties as long as the activities by which the mediator does so is consistent with the Rules for Certified and Court-Appointed Mediators.

The mediator must assess the interaction of the parties, their demeanor during the mediation and whether making such “suggestions” would be inferred as intimidation or coercion by the parties. The Committee recommends using the tool of “open ended questioning” may be preferable to making specific suggestions.



FLORIDA SUPREME COURT
Mediator Ethics Advisory Committee

Opinion Number: 2018-002
Date Issued: August 21, 2018

The Question

Prior to an appellate mediation, the lawyers for the appellant and the appellee provide the mediator with confidential pre-mediation statements. Those statements identify a few appellate court decisions that might be relevant to the issues on appeal. Prior to the mediation, the mediator conducts some research, reviews the cases identified by counsel, and he finds another appellate case/decision that neither counsel has identified. The mediator believes this appellate case/decision may be very helpful and relevant to the negotiations. The holding in the case may help one party in the appeal to the detriment of the other party.

During the early stages of the mediation, the mediator asks the lawyers if there are any appellate court decisions, other than the cases they identified in their pre-mediation statements, that might be helpful to resolving the issues on appeal and, more importantly, to advancing the settlement discussions. Despite the mediator's best efforts, neither of the attorneys seems to be aware of the case the mediator discovered in his own research.

The mediator is aware of the importance of remaining impartial throughout the mediation process and is committed to assisting all parties, as opposed to one individual consistent with Rule 10.330. The mediator is also mindful of his obligations under Rule 10.370 which allow him to provide information that he is qualified by training or experience to provide. The mediator is also aware of the Committee Notes to Rule 10.370 which state, in relevant part, "The primary role of the mediator is to facilitate a process which will provide the parties an opportunity to resolve all or part of a dispute by agreement if they choose to do so. A mediator may assist in that endeavor *by providing relevant information or helping the parties obtain such information from other sources.*" [Emphasis added].

The mediator believes the appellate court decision is relevant to the resolution of the issues in the mediation, that the attorney's may have overlooked this information, and that each of the attorneys and their clients should be informed of the case so they can consider what impact, if any, it has on their willingness to settle or advance the case through the appellate process.

Questions:

1. If a mediator is aware of a case that neither attorney/party is aware of and which the mediator believes may be important to resolving the issues in the mediation, is the mediator permitted to disclose the existence of this case to the attorneys/parties consistent with Rule 10.330, 10.370, and the Committee Notes to 10.370?

Should the mediator disclose the existence of the case to the attorneys / parties??



How does a Mediator Ethically Utilize
Breaking Impasse Techniques???

MEAC Opinion 2008-004 provides a
Mediator with guidance.

*Advisory Opinion**MEAC 2008-004*

MEDIATOR ETHICS ADVISORY COMMITTEE c/o Dispute Resolution Center Supreme Court Building Tallahassee, FL 32399

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

Before a mediator uses [the Baseball or Mediator's Offer] or any other impasse avoidance techniques, the MEAC suggests careful consideration of the following analysis:

1. Threshold provisions:

- A) A mediator must employ any impasse avoidance technique consistent with the requirements of impartiality under Rule 10.330(a). [Impartiality]

- B) A mediator must protect the right of willing, fully-informed parties to decide all substantive matters before them. Rule 10.310(a). [Self Determination]

2. Various limiting provisions in the rules. [Balancing Test: Supporting v Limiting Provisions]

A. 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.
- 2) 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.

2. Various limiting provisions in the rules. [Balancing Test: Supporting v Limiting Provisions]

B. 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.

3. Totality of the Circumstances.

What does the “Totality of the Circumstances” mean?

A Totality of the Circumstances means decision making is based on all available information rather than bright-line rules.

Consider the Circumstances and Timing of each mediation.

3. Totality of the Circumstances. [Consider the Circumstances and Timing]

A. Circumstances:

1) 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.

Examples: Sophistication of the parties; type of mediation/case; time/location of the mediation; pre-suit mediation; mediation during docket hearings; cultural diversity of the parties; language barriers (use of interpreters); socio-economic status of parties; hostility of parties; unprofessional counsel; etc.

3. Totality of the Circumstances. [Consider the Circumstances and Timing]

B. 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).

a. MEAC Opinion 2008-004 opines regarding the use of impasse avoidance techniques:

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.

Any mediator choosing to proceed with [impasse avoidance techniques] must do so only after first considering the **various limiting provisions** in the rules and **the totality of the circumstances**.

TAKEAWAY – “SAINT”

SELF DETERMINATION: Respect the parties right to self determination during mediation.

ADVICE AND OPINIONS: Remember that ethical guidelines are crossed when a mediator offers "a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of "any issue."

IMPARTIALITY: Do not employ an impasse technique that may show favoritism or bias in word, action, or appearance from the mediator.

NEVER: Force an impasse avoidance technique into a mediation.

TOTALITY OF THE CIRCUMSTANCES: The timing and circumstances of each mediation dictate the use of impasse avoidance techniques.

Ethically Utilizing Impasse Avoidance Techniques

OR

“What to do when things aren’t going well during
the mediation”

Silver Bullet aka Baseball.

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.

Mediator's Proposal.

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.

BATNA / WATNA

BATNA – Best alternative to a negotiated agreement.

WATNA – Worst alternative to a negotiated settlement.

“BIDDING AGAINST YOURSELF”

Used to generate movement by inquiring parties to reconsider their final offer and keep the conversation moving forward towards a settlement.

“Bidding against oneself” can be used with either party in caucus.

Focus on a time/future once the litigation/case is over.

Paint a scene for a party describing a future time when the case has been resolved focusing on how that party will benefit (health, solace, etc.).

Bracketing.

Negotiation Bracketing is the process of making a conditional offer linked to an expected response from the other party.

Brackets communicate that the midpoint is a likely settlement point for the negotiations.

Be careful when using Brackets and conditional responses. Examples of this are “if then” monetized offers like “If party A offers \$400, 000 then party B will offer \$250,000.

A mediator should use care to avoid creating a bracketed negotiation because some parties are more sophisticated which may create an advantage.

Issues as low hanging fruit and horse trading/concessions

Ask the Parties if they agree to set the impasse issue aside temporarily and go on to something else - preferably an easier identified issue.

See if a minor issue from the other side can be “agreed to” and offered in an effort to move a stalled negotiation.

Identify Alternatives.

Ask the parties to identify and consider alternative options to their issues.

Use the tool of “open ended questioning” instead of making specific suggestions.

Cathartic Release

Parties just want someone to listen to their side of the “story” and get their moment to vent or their “day” in court.

Know the Deal Breakers.

A deal breaker is a point that is crucial to an agreement between the parties and one in which one or more parties will “walk away” from the negotiation if it is not addressed and resolved.

Deal Breakers may be universal or unique to one side.

Take a Break.

Mediation is stressful and tiring for all parties.

When the mediation participants seem to have given up during a mediation, sometimes taking a break is the best option to renew active discussions.

Participants (and mediators) have a way of looking differently at mediation when they return.

Closed Dutch Auction

A refined version of the “I cut; you choose” method by which two children would share the last piece of cake.

Each party submits a “sealed” bid to the mediator, setting forth the price at which they would sell their 50 percent share.

The party with the high bid “wins” and buys out the other party’s interest at the lower bid amount.

Business Decision.

Ask one, or both parties to consider looking at the offers from a business perspective v. emotional.

Consider the other sides position.

Ask one, or both parties to consider issues raised by the other side.

Emphasize respect for persons, attempt party to empathize with the other side, agree without conceding, recognize the legitimacy of their interests.

The Ethics of Breaking Impasse

BRIAN GRUBER / LLOYD COMITER

brian@imlrlaw.com

info@mediationtrainingacademy.com