

Deadlock breaking strategies

Adapted from the Australian Commercial Disputes Centre (ACDC) commercial mediation course *Techniques and Strategies used in the Mediation Process – Breaking an Impasse* 1995.

Option	Approach
Other options	Think laterally about other options and make appropriate suggestions by saying, “What if we try ?”
Point out progress	Point out how far the parties and the mediator have come and how much has been achieved.
Create doubts	Create doubts in the minds of the parties about the perceived strength of their case.
Find an outside objective	Look for an outside objective source or standard that is respected by both parties eg. “What would ... think?” or “How would this measure against ... ?”
Establish objective criteria	Establish objective criteria eg. market value? tradition? cost plus? what the courts might decide?
Outside determination or appraisal	Suggest an expert determination or appraisal on outstanding issues led by a person respected by both parties.
Point out the BATNA	Point out their best alternative to a negotiated agreement (BATNA), the consequences if no agreement is reached, the likelihood of costly legal and court action, lost time, the uncertainty of the result from the courts and the breakdown of goodwill.
Ask hypothetical questions	Ask hypothetical questions and explore hypothetical situations eg. “At your child’s 21st ...” Sometimes make absurd suggestions, which you know will not satisfy either party but may get them talking.
Get assistance	Get assistance from stabilising participants who want the process to continue.
Move on to other issues	Move on to other issues in dispute and return to the difficult issue later.
Justify positions	Make each party prepare, think through and justify their positions and deal with the other party’s arguments.
Take a brief recess	Take a brief recess to let the parties cool off and reconsider their positions. Give a party the time to gather their thoughts. Meet with parties in private caucus/session.

An adjournment	Suggest an adjournment.
Suggest termination	Suggest that the mediation may have to be terminated. It is likely the parties will not want to do this. It requires experience and great skill to know if and when to make this suggestion.
Go graphic	On a white board list issues or priorities. List the points agreed on. Sometimes a pie chart or symbols might work better. Many people visualise things better if they see it.
Disappointed mediators	Talk about how hard everyone has worked and how disappointing it is to have come so far and not settle.
Role reversal	Try a role reversal. Suggest that they act out the position and situation of the other side. Have them play the role of the other side.
Provide encouragement	Encourage a party to continue by saying, "That's interesting", "I see" or by showing non-verbally that you are listening eg. nodding or smiling.
Phrase questions for a positive response	Use leading questions for "Yes" answers. "Of course we all want the best for the children don't we?"
Try humour	Tell a joke or use a story to break the ice.
Be silent	Just sit there and let them do something.
Reframe problems as current	Ask the parties to look at the problems as though they have just happened. Recreate the events as if they were happening just now.
Take a fresh look	Ask the parties to help you to come up with a solution or to take a fresh look at the situation.
Listen for changes in positions	Listen for changes in position and signs that a party is willing to change. Indications of this are, "If you're willing to ...", "It might be possible to ...", "I might be able to ...", "I could be satisfied." Acknowledge change and compromise.
Communicate possibilities of movement	Talk about the possibilities for movement.
Use external pressures	Make use of external pressures such as deadlines, court dates, costs being incurred or opportunities lost.
Seek a summit	In disputes between two or more groups, seek a "summit" with a spokesperson from each side.

Deflate unrealistic demands	Deflate extreme or unrealistic demands and positions. Reality test demands.
Reframe	Translate positions and proposals into understandable and legitimate terms.

Some other ideas:-

Legal costs	Ask each party to obtain from their solicitor details of the legal costs to date, costs of preparing for a hearing and costs of a court hearing. How do they compare to the amount in dispute?
Recovery position	Discuss with a party the prospects of recovering the amount claimed even if they win at court.
What presses their buttons	What are the parties' real motivations? Try to identify the things that get them worked up (so as to steer around them) and what things that keep them on track (to encourage)?
Do the maths	How far apart are the parties in dollar terms compared to the total amount. Parties might be able to agree on the minimum to be paid and leave in dispute only the balance to be paid. How does the amount apart compare to the legal costs?
Add the costs	Ask parties to increase their offers or decrease their demand by the amount of the legal costs they save by settling.
Split the difference	Meet half way.
Abdicate	Agree on someone else to decide the issue.
Ballot	If there is a deadlock over something such as which days of the week, hold a lucky dip, pick the days out of a jar with bits of paper in with the days of the week on them.
Put money where their mouth is	What if a party is adamant about an expected sale price? Make the agreed payout conditional on that price. If the price obtained is greater, the other party shares in the extra.
Risks of production	Raise in private or joint session whether the party or parties realise that a Court may require production of all documents relating to the matter eg. letters, emails, internal memos, financial records, statements, reports & risk assessments.

The following is more from a negotiators perspective:-

Leo Hawkins, Michael Hudson & Robert Cornall in *The Legal Negotiator* Longman Professional 1991 suggest these steps for breaking negotiation deadlocks:-

Step 1	Accurately identify the other party's needs that are not being met
Step 2	Review the process of how you are managing the negotiation and stop discussing the content of the matter on which you are deadlocked. For example, check your client's and your own negotiating <i>style</i> . How is your behaviour affecting the other party? Check the negotiation <i>climate</i> . How much trust is there?
Step 3	Act to create some kind of movement that is seen by the other party as potentially moving the negotiation towards meeting his or her needs, without causing any loss of face either to the other party or to your client. This requires imagination, creativity, resourcefulness and lateral thinking.

Leo Hawkins, Michael Hudson & Robert Cornall in *The Legal Negotiator* Longman Professional 1991 suggest these steps for deadlock breaking process options:-

- Caucus
- Go off-the-record
- Discuss common purpose
- Summarise and confirm the areas of agreement
- Redefine issue(s) in some different way
- Introduce a new subject, new information or a wider issue
- Look for similarities to build on
- Find a bridging issue, such as overlapping needs
- Recollect a previous good association
- Review past or future needs
- Review future consequences of failing to reach agreement now
- Discuss what alternatives remain and try one for a trial period
- Establish a task force with members from both sides
- Ask a hypothetical question
- Suggest a conditional offer
- Request participation, ask for their help
- Discuss what process can be used to break the deadlock
- Appeal to an authority, suggest use of a third party
- Suggest mediation
- Change negotiators, change time or place of negotiation
- Be empathic, use questioning technique
- Try a quick settlement based on a specific "yes-able" proposition

In *Negotiation Theory and Techniques* by Nadja Spiegel, Bernadette Rogers & Ross Buckley Longman – Butterworths 1998 suggest that,

“The deadlock has occurred because a substantive, procedural or emotional interest of either one or both of the parties has not been satisfied. To break the deadlock first identify what has caused it; this will allow you to consider the appropriate intervention to resolve the impasse... In short, to break an impasse it is necessary to generate some change.”

Briefly, if the deadlock is “**substantive**” they suggest trying to change:-

- the assumptions the parties are relying on
- the information that is available
- the issues
- the views of the costs
- the time available
- the order of dealing with the issues
- trade offs with past decisions
- take a break to allow further advice to be obtained
- look for new ways to reach resolution
- can the terms or conditions be modified not just the price?

If the deadlock is “**emotional**” they suggest trying to change:-

- the negotiators
- mode of negotiation
- speed of discussions
- physical environment
- style of the negotiation
- emphasise joint concerns
- put a difficult issue to one side
- the way you are using your voice
- take a break to allow parties to talk to significant others
- are the negotiations being used to continue a relationship with the other side?

If the deadlock is “**process issues**” they suggest trying to change:-

- find another process
- is it a fishing expedition rather than a genuine attempt at settlement
- start again
- is there a perception of unfairness?
- talk about the different processes available
- appoint a mediator
- move from adversarial to interest-based