

Mediation Can Resolve Deadlocks in Business Negotiations

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We think of mediation as an expedited and relatively inexpensive process to resolve disputes in litigation. However, mediation can also be a useful process in resolving deadlocks in business negotiations.

As an example taken from a real life transaction with the names changed and the facts greatly simplified, Big Company, Inc. was interested in acquiring ownership of the assets of Small Company, Inc. the stock of which was owned by two individuals, Sam and Harry, each holding a 50% interest. Big's president, Bob, contacted Sam and Harry and expressed his company's interest in an acquisition.

Sam and Harry agreed to consider an offer. The parties entered into a confidentiality and non-disclosure agreement which enabled Big to see all of Small's financial information, tour its facilities and review its assets. Big proposed an offer to purchase all of Small's assets based on Small's most recent financial statement's book value of those assets of \$5 million payable in cash at the closing. From the purchase price, Small's liabilities would be paid leaving \$3 million in cash to be distributed to Sam and Harry.

Sam and Harry countered at \$8 million as the value of the assets to be purchased based on their perception that the value of Small's goodwill was in excess of \$3 million. After weeks of negotiations the parties were deadlocked in spite of Big's offer being increased to \$5.5 million and Small's counter-offer being lowered to \$7.5 million; \$2 million apart. Neither side would budge a penny. Experts were retained by both sides but the expert opinions were also \$2 million apart. Both sides wanted to close the deal and all other details were agreed to. However, the value issue could not be resolved.

Big's in-house counsel suggested the parties engage a mediator to assist in breaking the deadlock. A mediator was selected and accepted by both sides. In confidential discussions the mediator learned that Sam and Harry were both in poor health and their conditions were the principal motivation for wanting to sell. The mediator learned from Big that its reason for wanting to acquire the assets was to enhance its balance sheet because it was negotiating with Bigger Company, Inc. to merge and the acquisition of Small's assets would increase the value of their interest. Neither side knew the motivation of the other. Without disclosing the motivations the mediator was able to convince each side to move toward a middle ground and a compromised purchase price was agreed to.

Once the mediator learned the motivation of each side he was able to use his training and experience to convince both sides to reach an agreement. Perhaps without the mediation one side or the other might have given in or further discussion might have achieved a compromise. However, with the assistance of the mediator both sides achieved their respective objectives and the sale was closed.