

“Go Work Your Magic”

The mediation process often comprises a series of private caucuses as the mediator engages in what the parties like to call “shuttle diplomacy,” and we mediators call “mediator ping pong.” Those individual sessions often force the mediator to fight for every inch of turf and require the re-litigation of the issues in the case. Parties often believe that if they persuade the mediator of the wisdom of their position and the unquestionable bad faith of the position taken in the other room, then they will “win” the mediation.

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At the end of these private meetings of posturing, positioning and persistent bargaining, as I make my way to the door, the parties often call out encouraging platitudes: “That’s why you earn the big bucks;” “If it was easy anyone could do it;” or my personal favorite, “Go work your magic.” As I leave the room after these sessions and platitudes, and head down the hall toward the opposing side’s room, I often think about what the “magic” is that makes the mediation process successful.

There are endless skills, tips and tools of the trade, but, in my experience, there are six distinct yet interrelated critical-concepts that drive the process of a successful mediation.

The first of the six concepts is the importance of fighting through the initial disappointing exchange of numbers at the start of the day. Plaintiffs worry they will leave money on the table and will expose weakness if they make demands near a realistic settlement value too early in the process. To be fair, plaintiffs often make their first demand in the blind, with no offer on the table from the defendants and against the backdrop of not knowing what, if anything, the defense will offer. Similarly, in the face of high demands, defendants reflexively respond in kind - fear of midpoints; fear of seeming over-eager; fear of being reasonable in the face of unreasonableness; and fear of the ultimate sin of appearing weak. If I let the first bid and the first ask dictate the rest of the day, very few mediations would make it to lunch. When I fight through the first disappointing exchange and provide the parties with perspective on the personalities and negotiating styles of the people involved, the market context for similar matters, what a reasonable outcome might look like, and perhaps, most importantly, read the signals that I gleaned from the exchange, all the while pushing the parties to move, I have taken them through the first step of a productive process.

The next concept, which is related directly to fighting through the initial exchange and referenced above (but so important as to merit its own paragraph), is reading

signals. In any mediation there are two negotiation tracks: the “official track” and the “unofficial track.” The “official track” is the first opening exchange and the ensuing formal bids and counters with parties gravitating toward playing it safe and avoiding the perceived evils of “floors” and “ceilings.” The “unofficial track” comes into play as a safe way for me to encourage discussion that starts to reveal the parties’ intent. Examples of the “unofficial track” include my reading of: midpoints; feasible territory (parties asserting what they will never do, which provides insight into what they may do); parties continuing to negotiate in spite of certain territory being cut out by the other side (e.g. one side draws a line in the sand that the eventual settlement will never be above, or below, a certain number and the other side continues to negotiate - perhaps suggesting that the line in the sand will be respected, but at a minimum conveying information in the process); and violent head-shaking reactions to brainstorming one set of brackets but embracing a different set of brackets. There are numerous moments throughout the day in which it is the “unofficial track” rather than the “official track” that advances the ball. Many times the progress in a negotiation results from the parties drawing encouragement from, and responding productively to, what I convey to them that I am reading from the other side, rather than what the other side is actually doing.

The third concept is if there is one constant in what I do as a mediator it is that people say one thing when their numbers are far apart, but do different things when they are close together. There are days when the sole, best strategy is to slowly and methodically get the numbers closer together. When the numbers start to converge, often a light will emerge at the end of the tunnel. Someone will inevitably make a call and acquire new authority; someone will pull me aside in the hallway and reveal additional flexibility; someone will do something that they said they would never do.

The next concept is the dynamic of psychological investment in the process. There are two simplistic psychological “investment” concepts at work. The first is that people like and want a success story. Fundamentally, as human beings we want our efforts to succeed. The harder the parties work and the more time, money and emotion invested in the mediation process, the more the parties are driven to settlement to see their efforts pay off. The second psychological “investment” dynamic is a fear of disappointing the mediator. This was a wake-up call to me when after a recent mediation one of the parties shared that they had really struggled with compromising, but they did not want to disappoint me. The lesson is that if the parties see the mediator as invested in the process and working hard toward resolution, they do not want to let the mediator down.

The fifth concept is that there is a magic number in any negotiation (whether bid or ask), when the party that is the recipient of that number starts to feel and see hope

and starts to negotiate differently and more productively. My partner and mentor Judge Weinstein (a fly fisherman), refers to this concept as “putting the hook in” and I can often feel the mood in the room shift when I convey the “hook” bid or ask. I watch this happen on a regular basis as parties begrudgingly move back and forth but then all of a sudden one party or the other becomes increasingly more engaged and flexible than previous moves had suggested. It might be that the defendants just needed to see a demand under 10 to be willing to aggressively move to settle the case. Similarly, it might be that once the plaintiffs saw a 5 on the table they decided it was time to move in a way that would get the case resolved. Until the plaintiffs made a demand under 10, or the defendants put 5 on the table, each side was cautious. Once one of those things happened, the “hook” was in.

The last concept, related to the importance of credibility in negotiation (a concept worthy of a separate article), is the ability of a party to look the mediator (and perhaps those on the other side) in the eyes and convey a message and be believed. The numerous components to this, include reputation, credibility and picking that exquisite number that makes sense given all the considerations in the matter, to name a few. In a recent mediation, after a grueling day with each side engaged in a long slow tug of war over the million dollar mark, the plaintiff came in above one million dollars and said “best and final” at a number that did not resonate given all the back and forth and merits as a final number. The defense response did not hit plaintiff’s bid, but was close enough and the plaintiff responded and moved off the “best and final.” The same scenario played out two more times when the plaintiff gave his “best and final” number and then further revised it downward. Finally, the defense lawyer looked me in the eyes and conveyed a number and said “at this number, I am done.” He meant it and I believed it... the case settled at that number. While credibility and sincerity are not unique to one side of the “v” or the other, when a party to a mediation has the credibility to look a mediator in the eyes and mean what he or she says, it can have a significant and meaningful impact on how the matter resolves.

As I walk down the hallway, the words “work your magic” still ringing in my ears, I brace myself for the next round of hyperbole and expressed disappointment, I remind myself to trust in the process and the six concepts above, and I wait until the light begins to appear at the end of the tunnel. 