



NEGOTIATING THE SHOALS OF MEDIATION

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I RECENTLY TOOK A CLASS in negotiation. It was taught by a well-regarded social scientist. The instructor taught us to increase negotiated advantages and avoid negotiation pitfalls. We planned strategies and learned the value of taking or abandoning various positions. This was all in an effort to obtain the best strategic outcome for our “side.”

The course interested me for two reasons.¹ First, I’d never taken a negotiation course. Second, having retired from the Bench, I now have a late-career, as a mediator and arbitrator. It seemed to me it might make sense to learn the tactics used by and against the lawyers whose cases I mediate.

After taking the course, it occurs to me that my mediations work best if I can avoid or deflect almost everything I was taught in class.

This is because mediation is not a matter of winning or losing. It is a different beast. At its best, mediation is a collaborative effort by the participants (and, hopefully, the mediator) to resolve a problem. Certainly, no participant wants to capitulate, or be victimized by the process, but at the same time, if mediation is to succeed, neither

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¹ Maybe there were three reasons: after all, the CLE program *was* conducted on an Alaskan cruise.

side can realistically hope to eviscerate the other. Real mediations simply do not result in one side walking away with a golden fleece while the other is left to drink the bitter dregs.

Only a Pollyanna believes mediations inevitably lead to congenial win-win outcomes. But each side must consider the flaws as well as the virtues of their case. If they do so, they can better assess their chances of a stunning victory or a catastrophic defeat, with the accompanying risk of a bitter and expensive court battle.

Our class taught the value and strategic importance of the First Bid. We learned that it matters greatly who goes first and how their bid or demand is structured. There are countless permutations: if one party goes first, it may be perceived as weak; if a demand is high, it may suggest a feeling of superiority and strength; if the defending party makes the first move, it may suggest weakness; if the offer is too low, it may stifle the negotiation.

As I see it, this kind of strategic maneuvering eventually becomes suffocating. It's just a fact: Somebody simply has to move. Otherwise, we never get off the dime.

If the lawyers and their clients are hung up on one of these Alphonse and Gaston² issues, I impose a solution. I simply call both sides together, and tell them *somebody* is going to move. I solve the problem by extracting a quarter and assigning "heads" to one side, and "tails" to the other. When the quarter is flipped, the losing side is *directed* to move, and off we go. The quarter removes the opprobrium of being the first mover. At least the case gets going.

It's always interesting to watch parties structure successive moves. Some are, apparently, intended to show strength or, perhaps, disdain for the other side's "wrong" or "offensive" bid. As a mediator, I couldn't care less. The mediator is an advocate for the ultimate resolution, not for one or another "signal." The collateral, of course, is the party making one or another move may perceive it has issued a signal. Whether or not the other side receives or understands the signal, is an entirely different thing.

² It's OK to look it up.

Negotiating the Shoals of Mediation

Early in my mediation career, a very perceptive lawyer said – as we passed along irrationally high or ridiculously low bids – that we were in the period of “happy numbers.” Happy numbers are demands one side knows will never be satisfied, and offers the other side knows will never be accepted.

While these kinds of activities may be part of a negotiation, they are simply a preamble to the necessary mediation. If it’s a one-day mediation, I usually consider these to be prior-to-2:45 p.m. numbers. It seems we have to go through these steps, in order to approach the main event.

There are, of course, some things that really do complicate a mediated resolution. One such item is overconfidence by either side. Both parties need to recognize that all the world’s virtue is not on their side, nor is all of the evil aligned with the other. There is a kind of natural tendency for everyone in one side’s room to continuously puff up their own position and applaud their own moves.

Another problem occurs, particularly in “early” mediations (where no depositions have been taken). Here, parties may not have seen their positions vigorously challenged. Discovery can enlighten a party, by pointing out that there may actually be contrary views of their case. Until a party’s position has been challenged, that party is often unrealistically confident of its own position.

This situation can challenge a mediator, who may have to attempt to point out defects or problematic issues in the optimistic party’s position. When doing so, however, the mediator’s observations may be regarded as favoring the other side. This can lead to a perception of mediator bias. Oh, well. Nobody said mediation is easy.

Other problems arise when mediating parties “overthink” the process. They can tie themselves in knots as they ask, “if we make this move, what will the other side do?” Then, responding to their own question, they begin to modify their posture. To a certain extent, this may be strategic, but if taken to extremes – and it does happen – it can lead to a roadblock as one side persists in playing chess with itself.

Each party, of course, has to continuously assess its own position. Their assessment necessarily changes, as each side successively makes its own moves. This give-and-take is, ultimately, a means of exchanging information, as each side “teaches” the other – and ultimately itself – the overall value of the case.

No party will, nor should it, “give away the store.” But at the same time, in my experience, an overstrong belief that one or the other party can only go to a certain point and never move beyond is not a very useful strategy. Setting aside the realistic possibility that this kind of thinking may scuttle a perfectly reasonable settlement, such posturing restricts the kind of flexible thinking that can lead to a useful resolution.

As I reflect on the negotiation course I took, it seems clear to me that over-strategizing is simply a substitute for creativity and fair-minded assessment. Creativity and realistic assessment are essential, when difficult matters need to be resolved. This was brought home to me in the context of the most difficult mediation in which I have ever participated.

This difficult mediation occurred, surprisingly, as I “mediated” a “case” for students just finishing a law school mediation class.³ The mediating parties were, in fact, two teams of the students. I participated as an adjunct faculty-teacher, who engages in mediation practice on a regular basis.

The “parties” were dug in hard. They negotiated and mediated vigorously. The proceedings were arduous and went on for a painfully long time. We finally hammered together a “settlement.”

When this session concluded, I asked myself why this mock proceeding had been so difficult. I finally realized it was so hard, because the students were not mediating to achieve a settlement; they were “mediating” to get a good grade – by showing how good they were at mediating. That’s not how mediation is supposed to work.

³ It is a measure of my advancing age, that Mediation is now recognized as a legitimate law school course. There was no such thing, when I attended law school, during the Stone Age.

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To get to a “good” settlement, each side ultimately has to make a bid that’s attractive to the other side (at least good enough that they’ll accept it), and a corresponding demand that attracts the opponent (or at least that they can swallow). The belief that there is such a point, where each side gets at least a share of what it wants and needs, is what makes a good settlement – and, maybe, a good mediator.

