

## Tips for Working With People in Conflict: Working Through “Gaps” in a Settlement Negotiation



Those who study the negotiation process and train negotiators and mediators have, through time, devised their own construct to explore and discuss negotiation issues. Through this process, specific categories of negotiation situations have been developed, mostly for the purpose of designing negotiation training to prepare mediators and negotiators to work with similar situations. Through this process

a wide variety of training scenarios have developed, based on common situations that a negotiator or mediator is likely to encounter.

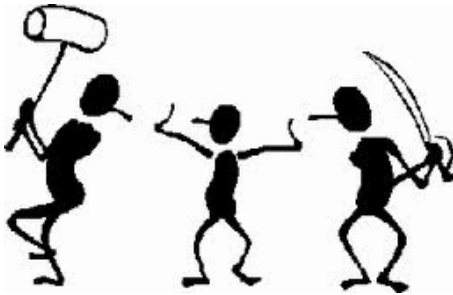
In my March 13<sup>th</sup> blog posting called “*Trees: A Mediation Lesson-Learned*,” I spoke of one such scenario, that of working beyond a potential impasse situation by encouraging the participants in the mediation to look to different forms of “currency” beyond dollars, in order to resolve their case. In classic negotiation theory, that article discussed a scenario that exemplified shifting the negotiation focus from a **distributive negotiation** – that is, one where only one thing (typically money) is the focus of the negotiation, to an **integrative negotiation** where other items in addition to or aside from money are the focus of resolving the issue. In *Trees* I described a real-life scenario where shifting the focus in a mediation session from *dollars* to end a dispute to replacing that focus with *trees* (that might die), resulted in a successful outcome.

Another situation that mediators and negotiators will commonly encounter is called a “gap” situation. This typically involves a negotiation or mediation process, during which the parties struggle to close the differences between their starting positions in an effort to find a figure that both parties find acceptable in order to resolve their dispute. It is not unusual for the parties to begin with a focus on money and to begin to close the differences in their respective starting points, with incremental concessions. Once again, because the



parties' focus is often on a single item, it is not unusual for them to reach a point where one party reaches his or her bottom line, while the other reaches his or her point of maximum concession. Often these are based on figures that each party arrived at long in advance of their discussions and often each party's respective point of maximum concession falls short of what the other party might find reasonable and acceptable.

A few years ago, I was asked by our local district court to conduct a mediation to resolve pending lawsuit between a local gallery owner and a local artist. Santa Fe, New Mexico is a renowned art center and its high desert setting is a favorite among artist. The case I was asked to mediate involved a situation where the dispute had escalated from a disagreement about a consignment fee, into claims of defamation, breach of contract and a battle in the local news as well as in the court.



We held the mediation session, which both parties only agreed to attend because the court insisted. The mediation went through a series of classic stages. Knowing that the situation was emotionally charged, I went to great lengths to begin the mediation with a discussion of ground rules. After much venting collectively and in their separate caucuses with me as the mediator, the parties begin to discuss what it might take for each side to dismiss its claims.

The mediation was making solid progress but after hours of emotionally charged discussion both parties were exhausted. However, the parties felt like so much had been invested in the process that they should keep working toward a settlement. Ultimately, it became apparent that the parties were stuck and that an impasse was very likely. As the mediator, I felt that I had asked the right questions, carried the offers and counter-offers and faithfully conveyed each party's rationale for their offer and position. Finally however, after seven hours of negotiation, it looked like we would fall short of settlement.

It was now fairly late in the evening and in desperation I suggested that we take a break and return for one last plenary discussion. As the mediator, I felt that I needed to rack my brain to see what other questions I could ask and options I could suggest for the parties to explore. It seemed that there had to be some link that I had missed. The gap was sizable, but did not seem insurmountable. Exhausted myself, I essentially came up dry. I returned to the mediation room



and sat waiting for the parties to return. Minutes passed and neither side returned to the room. As the minutes passed, I began to wonder if the parties had simply abandoned the process and disappeared!

Finally, and much to my surprise, the two principals returned to the room together, arm-in-arm with smiles on their faces and discussing scheduling a lunch. I was



flabbergasted and confused. What was going on? What did I miss? It turned out that during the break, both gentlemen had stopped to use the restroom, and during that particular moment, the artist had said to the gallery owner something like “Look, I have a sculpture that I could give you to sell in your gallery. It cost me less than my maximum point of concession to have cast, but you can sell it for

far more than your last settlement demand.” The gallery owner, who was familiar with the artist’s work, knew this to be true. And with that simple offer, not only was the case settled, but the relationship between the artist and the gallery was completely restored.

This humbling experience for me as the mediator served as a reminder that it is the participants who really own responsibility for settling their case and that we, as mediators, are invariably working with talented, intelligent people who, if enabled, have it well within their power to resolve their case. Settlement is not about the mediator. Settlement is about the people involved and their concerns. Nothing in the earlier conversations indicated that this sort of settlement approach was possible and I honestly failed to probe for the potential of some gap-bridging alternative like the one ultimately suggested by the parties. Often as the mediator we feel heightened responsibilities when an impasse looms. The lesson that I learned on this particular evening, was that sometimes the best thing that a mediator can do is to step out of the way, and let the participants themselves think and take ownership for their own success. The results they obtain are invariably perceived as more valuable than anything that I might offer.

BJM

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