

The “Magic” of Mediation Finally Revealed

By Bradley Bostick

When I was a full time litigator, it often amazed me when the mediator would return from the other room with a number that I didn't think we would ever get to. I wondered what kind of alchemy was performed to get the other side to realize the error of their ways.

Having now mediated several hundred cases, I know exactly what the mediator(myself) does in the other room to shift positions. I would like to share this with you but, as a member of the monastic order of mediators, I am compelled to swear a vow of secrecy. Be assured that each mediator has their own bag of techniques, honed and handed down.

However, I have been authorized to disclose one concept that may help explain why mediations are so successful. It is the concept of overcoming resistance to unpleasant truths(ORTUT). Most people only want to focus on the strengths of their case and acknowledge problems with their case either reluctantly or not at all. It doesn't help that the litigation process tends to be polarizing. Hearing it from the opposing side can create a mild form of ODD-oppositional defiance disorder, especially coming from overbearing counsel(on the other hand hearing the other side sincerely acknowledge your client's point of view can be extremely helpful.)

In steps the mediator. A good mediator can present the other side's arguments(usually in separate caucus), in a less threatening way that overcomes a lot of the natural resistance that most people have to hearing “bad” facts about their case and by extension, about themselves. This works because the mediator is a neutral simply transmitting information without endorsing it(but where appropriate helping the party appreciate the potential validity of some of the opposing parties “concerns.”) A mediator is a buffer that reduces the charge associated with what may sound like personal accusations or attacks. A good mediator can present these facts using language that minimizes reactivity. A good mediator will lay some groundwork before presenting the other side's position by explaining(usually to the plaintiff) that to make an “informed decision” about their case, they need to hear and consider all of the facts: good, bad and ugly(but without the squinty eyed close ups of the antagonists trying to stare each other down.) Indeed, they are fortunate to be able to hear the potential factual, legal or credibility problems with their case now rather than after committing time, money and emotional uncertainty only to whacked by some devastating evidence for the first time on cross examination.

Of course, in order for ORTUT to be successful, it is critical that the mediator has established a rapport with the decision maker. It also helps to remind them not to “kill the messenger.”

So there you have it. A limited, but hopefully helpful insight into the “magic” that is sure to take place at your next mediation.