

**WORKING THE MIDDLE HOURS:  
Keeping Negotiations Going, Late Morning to Late Afternoon**

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**Basic Truths.** Much of life is about negotiation. Some negotiations require more active participation than others. For example, “negotiating” one’s way to work in rush hour is a bit different than negotiating the purchase of a car but both require give and take of the stakeholders in order for them to each get what they want. Whether in the dispute arena or the neighborhood, the bottom line is that most negotiation is about getting what we want, or at least getting what we can live with. So we develop instinctive as well as strategic, conscious and subconscious mechanisms to survive in negotiations. And as a result, we consider ourselves pretty good at negotiating because we generally get what we want. When we don’t, the potential for eruption and conflict arise.

In the context of mediation negotiations, one or all didn’t get what they wanted. For whatever reasons, it also probable that effective communication methods left the parties long before they reached the mediation process. This results in false assumptions, erroneous foundational principles driving the context of the negotiation, and mistrust among the participants all the while they are trying to put together a solution they want and/or are willing to live with. Makes for lots of mischief.

**I. Laying the foundation for the Middle Hours.**

**A. Begin at the Beginning.** For mediators, advocates and parties, success and momentum in the “middle hours” doesn’t begin in the middle hours. It begins long before active negotiations commence. It is a basic principle of physics that action increases action so the role of mediator and advocate is to create the action *before* the parties reach the negotiation so that the energy will propel and support them throughout their negotiation exchanges.

For our purposes, negotiation is defined as a communication activity involving two people or entities, represented by competent legal counsel, who have some common goals and some potentially competing objectives. Inherent in this definition is the notion of uncertainty and mixed motive exchanges. These truths can derail even the most well intentioned participants if allowed to fester. Thus, there needs to be an exchange of trust.

**B. Creating Trust.** Trust is not given, it is earned. It is incumbent upon the mediator to know how much or how little trust exists in the triangles of the negotiation, i.e. between attorney and client, attorney to attorney, and attorneys and mediator. This should be learned before the actual mediation session commences, particularly if work needs to be done to generate a little trust among the participants.

An efficient method for getting the “trust temperature” is the mediator’s “heads up” phone call to each attorney prior to the mediation, and hopefully after receiving summaries. There is a lot of information about a case and clients that no competent lawyer will put into writing but yet, may be very necessary knowledge in order to properly structure the negotiation and to ultimately strike a deal. Pro-active mediators do not sit on the sidelines and carry numbers back and forth. We work and massage the elements of the deal, both human and intangible. Many of the “unknowns” affect the timing, the tone, the messages, the methodology and the content of offers and counteroffers. Having a clear

picture before the negotiations begin will allow the mediator to bring the added value to the bargaining that the participants are usually missing.

- C. Preparing the Advocates.** Assisting advocates in proper preparation of their summaries and their clients is the role of the mediator. Asking them to identify the client's underlying needs and interests seems so elementary and yet, very often, the lawyer has no clue what is really driving the client's escalation. Making sure the lawyer has at least attempted a candid conversation with the client about the achievable, probable and unlikely outcomes of the negotiation can go a long way to thwarting the unrealistic expectations that often taint the distributive aspects of the negotiation and slow it down.

Encourage counsel to adopt a flexible strategy. Effective negotiators have a plan and it is flexible. Think about all the movie scenes where there is a hostage situation. Certain aspects of the situation are non-negotiable but there are trade offs and they are often effective tools to a peaceful recovery. A wise bargainer has a plan and is willing to modify it, but he doesn't let the opponent sabotage his plan by reactions to the perceived unreasonable proposals or terms coming from the opposition. Someone once said "if you don't know where you're going, you'll end up there." The same is true for negotiators in mediation. If the client and attorney haven't identified a road map and a destination, they will flounder all through the bargaining and may never get to a reachable solution no matter how hard the mediator works.

- D. Have Your Own Strategy.** The mediator needs some strategies as well. Knowing when to play which cards, i.e. timing, and the tone of the messages that come with the play, are critical. Setting the parties up for successful conversations from the outset, managing a joint session, active listening and effective re-framing, solid but sensible questioning skills, people movement, creative thinking, energy and compassion are all elements of an effective mediator strategy. These can only be effective and influential if the mediator arrives prepared, with a solid foundation of information about the people, their issues, their perspectives and their trust.
- E. Avoid Self-Inflicting Wounds.** The mediator should establish ground rules about the process from the outset. Using language you wish others to use with you. Taking notes as opposed to interrupting a speaker so that important points can be raised at the appropriate moments. Active listening as opposed to texting or sorting through files while someone is speaking. Exercising patience with those who have a different tempo. Allowing room for reaction, reflection and response. Role modeling appropriate behavior. One can be respectful without agreeing. One can acknowledge without conceding. All of these intangibles influence the progress of the negotiations and will keep the momentum alive in the middle hours.

The mediator has a duty to help the participants "save face." They need an escape route. This means giving and keeping room for a party to change a perspective, alter a "certainty," or give

something for nothing in return. In mediation, the negotiation is a bit of a fishing expedition. Plaintiff wants to know how high the defense will go and the defense wants to know how low the plaintiff will go. Usually the parties don't know the answer, and often, not even the range of possibilities. So, they have to go fishing and they do it through the exchange of proposals. But, there has to be enough "bait" on the hook for the fish to be interested. The only way to know what kind of bait to use is to have a sufficient amount of data about the fish and its eating tendencies.

Extreme or ridiculous openings are a waste of time, and the bait. No one gains any intelligence about where the opponent is trying to drive the bargaining. Similarly, bottom lines are for the amateur. No one believes them and it puts the one making the ultimatum in a corner. Once made, the negotiator has lost control of the negotiation because it is now so simple for the other party to just say "no." It is usually better to send signals that one is being stretched and there may not be much more elastic to pull. This keeps the conversation moving, no matter how small the steps. So long as the parties are still at the table, and no one has "lost face," the opportunity to find the right solution still exists.

## **II. Anticipation Delivers Many Rewards.**

**A. It's Never Only About Money.** When negotiations appear to be reaching a stalling period, the mediator and advocates have to consider the reasons and identify the remaining hurdles to an acceptable solution. Are the hurdles substantive or strategic? Is the amount of the lien unknown or the potential for future medicals so uncertain that a party can't accept a solution? These would be considered substantive problems. Or, is there major disagreement among the lawyers about the applicable law, or still so much mistrust among the bargainers, that they are willing to play chicken even at the cost of uncovering a yet to be identified mutually acceptable solution? These would be classified as strategic impasses.

Usually mediators can't fix substantive problems and can only ask the participants to weigh the risks of the probable outcomes such as whether the judge will or will not grant the motion for summary judgment. Strategic impasses often arise in the middle hours and are things the active mediator can manipulate to keep the momentum of the negotiation in play.

After a while, rooms and people begin to smell. In the middle hours, it's often time to think about "re-arranging the furniture." Move people to a different space. Change the people dynamics- mix the people up in different formations or groups. Take a break. Go for a walk. Change the topic of conversation. Eat. Ask about interests and priorities. Help the participants identify and evaluate their risk aversion; then try to help them balance it within the context of the negotiation. Think about tomorrow and the opportunity of today. Identify the parties' common interests and goals. Brain storm every possible solution, no matter how crazy it seems. Weigh the options and have the participants rate them as to acceptability and probability. Insert some evaluative opinion or empathically express concern about problem areas in a position. Ask for help. All of these tools are ways a mediator and an advocate can gather information and fuel to uncover the missing pieces to the solution puzzle.

**B. Respect the Dance.** Every negotiation is a dance. It has its own tempo and rhythm and you can't short circuit the dance. Cutting to the chase too soon is like snuffing out the candle before the fragrance has filled the room. Valuable information can be lost or be missing from the dialogue and only when the negotiations begin to stall do the participants begin to realize they moved too quickly. The leader of the dance is always changing and each leader needs to know the score in order to lead. To get information, one usually has to give information. It is not a sin or a sign of weakness to seek data that is necessary to risk analysis and decision making. Nor is it unreasonable to make sure each opponent has a clear understanding of the rationale of the latest proposals they have made or received.

### **III. Understanding Physics.**

**A. Movement.** People, places and things all have a center of gravity; even asymmetrical objects have a mid-point. Anything can be balanced if it supported at the right place. In the midst of a mediation negotiation, this translates to the mediator's duty to provide support in the middle of the process, Support can come in a variety of forms including simple optimism to crafting sophisticated negotiation strategies with the participants.

Everything has motion and speed. Newton's first law of physics says that if no force is being applied, an object's velocity is zero (at rest), or moving at a constant speed in a single direction. Mediators can be influential and may need to be more pro-active and hands-on in the middle hours to keep the discussions progressing forward. Notable is Newton's 3d principle- when an object exerts force on a second object. The second object exerts a force of equal magnitude, in the *opposite* direction. This manifests itself when the mediator pushes too hard and gets negative feedback, or actual pushback from a participant. The extra force is not all bad and can be a catalyst to a productive conversation, assuming cooler heads prevail.

**B. Recognizing the Mid-point.** The middle hours of a negotiation are not necessarily defined by the clock or the gap in the proposals. Signs that the progress may begin to stall include slower/faster responses times to settlement concepts. Moves may become smaller (or larger), or even go backwards. Emotions may change. People may become frustrated, short tempered, disinterested, detached, and or exhibit a sense of despair- "we are never going to get this settled." They start calling the office, working on other projects/cases, reading the newspaper, answering e mails, disappear, check alternate flight options, etc. Some of the team members pack up and depart. The food is all gone and the room is starting to get stale. Another common symptom at this stage is repetition of arguments and positions that have already been well expressed. i.e. nothing new is coming about. And yet, they are still there and the mediator is still working.

### **IV. Resources in the Middle Hours.**

**A. Fisher and Ury.** Using the "getting to yes" principles, teachers of mediation suggest separating the people from the problem. Focus more on interests, not positions. Invent options for mutual gain. Insist on using objective criteria. These techniques can be

applied to change the content and tone of the dialogue, whether in caucus or joint conversation. If a solid foundation was created in the early stages of the mediation process, it is likely that some of the data necessary to build on these concepts was already developed and is ready at hand.

- B. Mediator Information Moves.** At this stage, it is usually best if the mediator more or less ignores the numbers being exchanged. They aren't what the parties will accept at the end of the day so they aren't worth the anxiety. A pro-active approach is for the mediator to begin to collect data and use instinct and experience to progress forward. Posing good hypothetical questions about what needs to happen next or how a party would respond if the proposal were "this" are great methods for collecting information without anyone committing to a new proposal. For example, if the negotiation numbers are: plaintiff at \$400k and defense at \$50k, the mediator might ask the defense the following: "If you knew the plaintiff's next number was going to be \$325k, how would you respond?" Or, "What does the plaintiff need to do to bring your number up to \$100k?" Or, "If you knew plaintiff's next number was going to be \$300k, would you go to \$100k?" If the defense says "Not \$100k, but we'd go to \$85k", that gives the mediator some good intelligence about where the next moves might need to go for the parties to begin to smell victory. When people start thinking they might get out of a mess, they become less positional and more inclined to make progress.

Another technique to collect important data at this juncture is to create a dialogue around options for response. For example, the mediator might ask a responding party to come up with 3 different responses and give the mediator an explanation for why each one makes sense. It requires a bit of brainstorming as well as deploying a sense of creativity that reduces or cools the escalated side of the brain and engages the calmer sections of the mind.

Another series of questions that may be appropriate at the right time are these: 1) *What* are we doing? 2) *Why* are we doing it? And 3) *Why* are we doing it *now*? This forces the responders to reflect on where they are, how they got there and how they might get away from the present state of the negotiation. It gives the mediator information about their negotiation strategy (or lack thereof) and may also prompt the sharing of information that addresses interests and needs of a party that may have previously not been detected or disclosed.

- C. People Moving.** Sometimes as mere change in the group dynamics can have a positive effect on the negotiation. Moving people around, pairing lawyers, pairing decision makers, going to lunch, taking a walk, breaking bread together, and changing rooms, all change the temperature of a negotiation. Similarly, changing topics lets an escalated mind slow down. Perhaps the discussions can focus on the non-economic terms of a settlement or the content and actual drafting of some provisions of the settlement agreement ( a psychological boost). Changing the topics entirely is also effective- playing a conversational game like jeopardy or trivial pursuit, slows the brain and creates a break.

- D. Getting Pragmatic.** Asking a legitimate question can also wake people up to the reality that they need to become more akin to problem solvers than disputants. If the timing is right, it's permissible for the mediator to ask "How long do you want this slugfest to continue before we can get the point where we can make meaningful progress?" This puts the burden back on the participants. Asking disputants to evaluate the impact and cost of the laborious judicial system on their dispute in the first hours of the mediation is often a waste of an effective resource, but raising the concept in the middle hours can be influential if done well. "Have you calculated the nonrefundable ticket price for a seat in the courthouse stadium if you don't get a solution today?" Framing this for a party in soft and hard costs, on terms that can be recognized and felt emotionally, can generate renewed enthusiasm for the negotiations. For example, "What would it be like if you could go out to dinner tonight and not talk about this case? When was the last time you were able to do that?" "When you were awake last night thinking about today, did you think about how many days you will have to take away from your work and family to sit in the courthouse?" "Wouldn't it be nice to go to the mailbox a month from now and not have another letter from your attorney?" "When you go to work tomorrow, would you rather be writing a memo to your supervisor (and the file) about the terms of the settlement or, a memo about the reasons why the case didn't settle and the revised litigation budget that will be needed?"
- E. Concluding Thoughts.** People are in a jam long before they arrive at mediation. One job of the mediator is to help them extricate themselves from the "big jam" which is the underlying dispute, knowing full well there is potential for a bunch of "little jams" in the negotiations. Being able to *anticipate* what those hurdles might be, engineering around them on the front end and massaging them in the middle of the negotiation are all important tasks of the mediator so that the "middle hours" become the "late afternoon hours" much sooner. Mediators understand that in the middle of a negotiation dance, the "real gap" in the settlement is not the same as the "apparent gap" that is facing the negotiators. By mid-day, if the mediator has done her advance preparation, been a proactive facilitator and listened well, she will have at least an instinctive sense of where each negotiator might need to land to resolve the dispute. Armed with that intelligence, the mediator can fuel and drive the participants closer to the "red zone" where they have a very high probability of finding their acceptable resolution.