

## **Beyond “Shuttle Diplomacy”**

by Laurie Quigley Saldaña

The biggest criticism I hear of mediators is: “The mediator just shuttled numbers back and forth. Anyone can do that!” Of course, even in cases of pure “shuttle diplomacy,” the good mediator benefits the process. (A few of these benefits come immediately to mind: providing a neutral evaluation of the case; helping the party or attorney exit litigation gracefully; neutralizing emotions and preserving relationships, etc.). But each time I hear this criticism of “shuttle diplomacy”, it makes me wonder...what makes a mediator successful? Good results, of course! But how those results are obtained deserves examination.

While many litigated cases are solely about money, conflicts often include non-monetary components of import to the parties. Mediators who take time to discover these non-monetary issues achieve more creative -- and better -- results. You may be thinking... “What? Non-monetary components? Lawsuits are about money!” Yes, most lawsuits are about money, as our legal system uses money to compensate parties who are truly aggrieved. However, non-monetary issues must not be overlooked, especially when the creative mediator attempts to “bridge the gap” and reach a settlement acceptable to all parties.

Examining the parties’ motivation and interests in a negotiation is the path to discovering the important issues, both monetary and non-monetary. Focusing only on the parties’ positions (i.e., I will do this vs. I will not agree to that) leads to an ultimate dead end. Instead, the good mediator always goes beyond the parties’ positions by asking questions to reveal the parties’ underlying motivation and interests. Uncovering the parties’ respective interests may guide the mediator to unique ways to satisfy those interests (and close the deal!). Let’s look at a few real life examples.

### “No Amount of Money is Enough”

Parents file a wrongful death action after their toddler son is killed by a city owned and operated vehicle. Liability is fairly clear and the parents continue to say (understandably) that “no amount of money” will compensate for their loss. Instead, they want a public trial. At mediation, after sincere empathy and careful questioning, the mediator helps the parents identify and verbalize their underlying motivation and fears about settling the case: The parents fear that once the case is resolved, it will be as if their son never existed. Their infant daughter will never remember her older brother. The parents and kids at the neighborhood park will eventually forget their son’s name. For the parents, a trial means forcing the public (or at least the judge and jury) to hear about their child and remember that he mattered. The mediator points out, however, that the trial will eventually end, leaving the parents in the same emotional vacuum in which they are currently. Issue: Is there a way to resolve the case and keep their son’s memory alive? Result: The city paid a substantial sum, but also agreed to erect a small statue of a boy playing in the city-owned park near the parents’ home. The plaintiffs’ interests are met, as the boy’s younger sister and all the local families talk about “Branden’s Park” and think of him often. The city’s interests are served by avoiding a public trial and the risk of a large verdict.

### “Looking Forward, Not Backward”

A commercial supplier and purchaser did business together for years. Then a dispute arose, a contract was breached, a lawsuit ensued, their relationship ended. At mediation, the positional bargaining was leading nowhere. In order to explore the parties' underlying interests, the mediator asked probing questions. To Party A: “Who supplies your company these goods now?” To Party B: “How has the loss of this business affected your bottom line?” To Party A: “Have you found another supplier who meets your needs as well as defendant did for years?” To both parties: “In this tough economy, is there a way to move beyond this dispute and focus on what is best for both companies on a go forward basis?” Result: some money was paid in settlement. Importantly, however, the CEOs recognized they were better off with each other than without each other. They agreed to meet within 30 days to fashion a new contract for the next five years!

### “I Feel Betrayed”

A longtime employee of a local company was laid off due to the economic downturn -- or terminated for a medical condition in violation of public policy -- depending on who you believe. At mediation, it was clear there were facts to support both sides, but the employer appeared to have the stronger case. As a result, the defendant's insurance carrier was taking an understandably hard line on settlement. After spending time listening to the plaintiff and hearing about her job, her family, her friends...it was clear that this case was not solely about money. The plaintiff felt betrayed by the people she thought were her “work family”. She was embarrassed to tell her friends and family that she was terminated, having never lost a job in her life. She thought the “lay off” reflected poorly on her as a person. Result: a small amount of money was paid in settlement. More importantly to the plaintiff, the employer's CEO penned a very sincere letter thanking plaintiff for her years of value and service to the company, expressing regret over the need for her departure, and wishing her health, happiness, and success in the future. And everyone left the mediation satisfied.

### “You Have No Idea What I Have Suffered”

A woman seriously injured when her SUV rolled over filed a products liability action against the vehicle manufacturer. At mediation, the defendant offered a seven figure settlement, but the plaintiff was tearful, angry, and -- as the day wore on -- seemed less and less inclined to resolve the case. The plaintiff expressed understanding that the case “should” resolve at mediation (due to the risk and expense of trial), but could not bring herself to settle the case. The mediator helped plaintiff express her feelings: she felt the defendant did not “understand” what she had gone through and how her life was irrevocably altered. The mediator left the room. She returned a short time later and said that the defendant's corporate representative wanted to hear directly from plaintiff as to how she had suffered. Plaintiff and the corporate representative (with counsel and the mediator present) sat across the table from each other while plaintiff described her sorrow, anger, and pain. Everyone was respectful and moved. Importantly, plaintiff felt she received her “day in court”. The case resolved shortly thereafter.

Of course, these examples would not work in every case. Many factors dictate what (if any) non-monetary components might serve to bridge the settlement gap. But unless the mediator tries, the parties will never know if such unique resolutions will succeed. We have all heard that “a successful mediation is one where everyone leaves equally unhappy.” I hate that expression. Instead, I like to think that while no mediated result is perfect for everyone, with hard work and a bit of intuition and creativity by the mediator, all parties can leave the mediation feeling that their interests were understood, valued, and satisfied to some extent. So let’s move beyond pure “shuttle diplomacy” and get to the heart of what truly matters to the parties.

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