

# mediation with joe salama



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How Mediation Works, Part Two: Expanding The Problem - August 19, 2009  
by Joe Salama

Although an exploration of underlying interests is important to get the parties away from position-based negotiation, often the underlying interest for both sides is the same, and it doesn't lend itself to simple resolution. This is when the underlying interest of the parties is about money.

A classic mediator approach to this type of situation is to separate the parties into separate rooms and begin telling each of them, using well-reasoned legal arguments and case law examples, why they will not win in litigation, and why they must therefore compromise their respective positions. This approach typically involves long sessions and lot of back-and-forth bargaining, with each party being made to feel progressively worse about their opening position. The parties often get to a point where they have bridged 90% of the distance between their opening numbers, and then they stop making progress. A good mediator will have seen this coming in advance, and may be able to get the parties past this point. But sometimes the conflict will not resolve, through no fault of the mediator, despite that the parties are only 10% apart. Make no mistake, this is not an easy process for anyone involved, and it takes much skill on the part of the mediator to obtain a settlement under these circumstances.

One alternative to this approach is known as expanding the problem. This is based on the premise that there must be something else besides money that has value that each party can offer the other party/parties that can be put on the negotiation table. Let's say we have a contractor who built a house for a couple on a lot. The couple prepaid for all of the materials and the labor. The couple was unhappy with a substantial portion of the result, claiming that it was not done according to specifications, and hired another contractor to redo it at a cost of \$50,000. The couple simply wants to recover the \$50,000 they had to spend to correct what they perceived as deficiencies.

Rather than simply going back and forth on a dollar amount that the contractor will pay the couple, if any, and argue over the extent of the deficiencies and whether

the work that was redone was necessary, the mediator can try to find other things that the couple could want from the contractor in lieu of money, or a portion of it. Perhaps the contractor could extend the warranty on the work that was performed to couple's satisfaction or build a further minor addition to the house at no charge, in conjunction with a lower dollar amount than the \$50,000. On the other side, maybe the couple could agree to be a reference for the contractor and even allow potential clients of the contractor in to see the house by appointment. Further, the terms of payment of the settlement amount can also be a way to expand the problem. For example, perhaps the parties would be willing to settle for \$50,000 if it is paid in monthly installments over several years. Several of these things could even be offered simultaneously.

Although it may seem like introducing more variables is making the problem more complicated than it needs to be, it is doing just the opposite: it is making settlement more attainable than it would otherwise be. Expanding the problem, if possible, increases the chances that the mediation will successfully resolve.

When you select a mediator to resolve your conflict or your client's conflict, try to ascertain whether that mediator would be open to expanding the problem. A little more time spent selecting the right mediator could make the difference.

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