

OVERCOMING IMPASSE: MEDIATOR MAGIC 101

By Patricia Prince

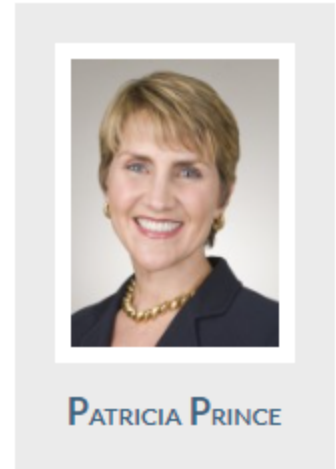
Four principles of “mediation magic” I regularly rely upon to overcome impasse are: 1) identifying themes; 2) believing that the parties are actually closer to agreement than they appear (my observations and some interesting research indicate that this is usually the case); 3) trusting the process; and 4) investing the time necessary for people to change positions.

Identifying Themes: Fellow mediator and Mediation Society Member Daniel Bowling introduced me to the idea of listening for overarching themes at the heart of the dispute for each party, such as being treated unfairly, being disrespected, or having one’s good reputation put at risk. Identifying themes expressed by the parties helps the mediator establish and maintain rapport, and can be useful when integrated with legal positions to discuss case strengths and weaknesses in a more meaningful way for the parties. Themes are particularly helpful as a moral impetus to reframe positions to meet overarching societal norms, such as fairness, dignity, integrity, honesty, and equality of treatment. A resonating theme overwhelms the dissonance of a shift in position.

Believing Settlement is Possible–You are Closer Than You Think: Belief in settlement is contagious. Neuroscience points to a state of connection such that “when we come to ‘feel felt’ by another person, we feel not only aligned with the other, but our brain likely establishes...a ‘neuroception’ of safety.”ⁱ with the parties and counsel. Bringing parties and counsel empathetically to the receptive state of safety is something good mediators do naturally. Once there, I maintain an open and optimistic belief in settlement.

When the going gets tough in the belief department due to a gap in case valuation (as opposed to interest in settlement), I keep in mind that cognitive processes can mislead parties into believing that they are further apart than is actually the case. Chief among these are false polarization and attribution error.

False polarization describes the tendency for opponents’ *perceived* differences to be greater than their *actual* differences. Studies have found that partisans in social-political conflicts overestimated the extremity of their positions, especially that of their opponents, but also, to a lesser extent, their own side.ⁱⁱ



This rings true in my mediations. In addition to perceiving the opponent's position as more extreme than it actually is, a party's actual position is often a little less extreme than the collective position taken by the party through counsel (i.e., the collective "us" position, which may include input from counsel, spouse, insurers, friends, etc.). Thus, the picture in both parties' minds is the *perceived* insurmountable gap between the positions of "us" and "them," when the *actual* positions of both parties are *inside* the "us versus them" extremes, significantly narrowing the *actual* gap to be overcome.

If not managed carefully by the mediator, attribution bias can act upon the negotiation process to contribute to false polarization. By the time a case comes to mediation, attribution bias is well entrenched, as disputants ascribe an "adversary's behavior to disposition and their own behavior to situations."ⁱⁱⁱ Thus, opponents in a mediation are predisposed to view any settlement overtures as being made with sinister motives, while viewing their own settlement positions as being constrained by circumstances beyond their control.

A successful mediation must reverse these tendencies. I work away from extremes by managing negative attributions, shifting perceptions and asking the parties to give me negotiating positions that test whether the other side might be less extreme than expected. Of course, once the perceived divide becomes small enough, the case can settle. As a mediator, knowing the gap is usually smaller than it appears, gives me a head start in bridging that divide.

Trusting the Process: Little need be said on this point, except that mediators should be the masters of the process. It is the expertise that is probably least understood by the general (and legal) public, but also the area where we add most value in guiding and customizing the mediation to fit the needs of each case before us.

Investing the Time Necessary for People to Change Positions: Changing minds takes time, particularly when both sides arrive at the mediation table deeply polarized and distrustful of the other side. This is simply part of the process and expectations should be managed accordingly. Each party takes a different path to resolution.

I employ many other interventions to overcome impasse, but identifying themes, believing positions are less extreme than they seem, trusting the process, and taking the time necessary for the process to work are my essential mediation tools—perhaps not magic, but remarkably powerful all the same!

i Siegel, Daniel J. *The Mindful Brain: Reflection and Attunement in the Cultivation of Well-being*. New York: W.W. Norton, 2007. Print. p. 129, citing Porges, S. W. (1998). Love:

An emergent property of the mammalian autonomic nervous system.
Psychoneuroendocrinology, 23(8), 837-861.

ii Robinson, Robert J., Dacher Keltner, Andrew Ward, Lee Ross (1995). "Actual versus Assumed Differences in Construal: "Naive Realism" in Intergroup Perception and Conflict." *Journal of Personality and Social Psychology*, Vol. 68, No. 3, 404-17. Web. Mar. 2016. 414;
Monin, Benoit, and Michael I. Norton. "Perceptions of a Fluid Consensus: Uniqueness Bias, False Consensus, False Polarization, and Pluralistic Ignorance in a Water Conservation Crisis." *Personality and Social Psychology Bulletin* 29.5 (2003): 559-67. Web. Mar. 2016. 564.

iii Kiser, Randall. *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*. Berlin: Springer, 2010. Print. 94.

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