

## CURRENT LITERATURE IN ADR

By Sherman D. Fogel

If you have been trained as a mediator, or studied mediation advocacy, in the last 25 or 30 years, chances are you have been taught interest based negotiation. Since the publication of *Getting to YES: Negotiating Agreement Without Giving In* by Roger Fisher and William Ury in 1981, virtually every mediator has learned some version of their approach, in which the parties are focused on their real interests rather than their stated positions, and seek “win-win” solutions. But some disputes really are just about money. If you have ever been frustrated in a money negotiation by parties engaging only in positional bargaining, and resisting all efforts by you, as mediator, to re-characterize the dispute as interest based problem solving, and been discouraged by the endless exchange of monetary proposals, seemingly relegating you to the role of messenger, then, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes* by J. Anderson Little is for you.

Little has mediated more than 4000 cases, mostly involving monetary disputes in a litigation context. He postulates that disputes about money “start with positional bargaining [and] end with positional bargaining,” and explains the techniques he uses to effectively mediate monetary conflicts. While acknowledging the common criticism that mediators of litigated cases are often directive and even coercive, he rejects the necessity for mediators to impose their own opinions on the parties, and shows how a facilitative approach can be effective even in a traditional positional bargaining process.

Little begins with ten perceptions held by classically trained mediators, and juxtaposes the ten realities of positional bargaining in monetary disputes.

1. Perception: Lawyers Are Disruptive in the Mediation Process  
Reality: Trial Lawyers Perform a Valuable Role for Their Clients
2. Perception: The Disputant Is a Single Individual  
Reality: The Disputant Is a Team of People
3. Perception: Litigants Are Eager to Discuss Their Cases  
Reality: The Parties (Teams) Tend to Withhold Information
4. Perception: Mediation Will Be Conducted in Joint Sessions  
Reality: The Parties Prefer Private Sessions
5. Perception: Mediation Will Focus on Needs and Interests  
Reality: The Participants Will Focus on Case Value
6. Perception: The Parties Will Engage in Creative Problem Solving  
Reality: Proposals Are Monetary in Nature – The Process Is Traditional Bargaining
7. Perception: Case Analysis Will Dominate Settlement Discussions

- Reality: Case Analysis Gives Way to Multiple Rounds of Monetary Proposals
8. Perception: Mediation Will Improve Working Relationships  
Reality: The Parties Become Angry with Each Other as They Swap Proposals
  9. Perception: Proposals Will Flow until Settlement Occurs or Best Numbers Reveal an Impasse  
Reality: Movement Stops before Best Numbers Are Reached
  10. Perception: A Mediator Is Useless When the Parties Are Exchanging Numbers  
Reality: A Mediator Can Do Much to Help the Parties Overcome Their Reactivity and Move Through Their Negotiation Ranges

Next is a discussion of tools and techniques to facilitate the flow of information, case analysis, and movement. Little offers real insight into the process of movement in traditional bargaining. Every move is a communication. What is the party trying to communicate? How will the move be understood by the other party? What reaction will the move produce in the other party? Is it the reaction the moving party is seeking? Little discusses how a mediator, in a facilitative rather than directive way, can help parties move through their full range of settlement authority without just reacting to the moves of the other party, getting angry and terminating the mediation before reaching their best numbers. And, if their best numbers do not intersect, he discusses how to help them bridge the final gap to settlement.

Little finishes with a discussion of the following twenty-five recurring problems in traditional bargaining, many of which include transcripts from actual mediations he conducted.

1. Who goes first? (Plaintiff)
2. Who goes first? (Defense) – “I’m not going to bid against myself.”
3. Claimant’s first proposal is higher than his case analysis.
4. One party reacts strongly to a perceived outlandish proposal.
  - a. “I’m out of here.”
  - b. “That’s insulting. Is that what they think my mama’s worth?”
  - c. “That’s insulting. Do they think I’m stupid?”
  - d. “I’m not going to bid against myself.”
  - e. “OK, I’ll give them as ridiculous a number as they gave me (\$500).”
  - f. “Go tell them to give me a realistic number.”
  - g. I’m not even going to dignify that number with a response.”
5. “They’re going backward.”
6. A low-ball proposal is made in order to send a message but it is not identified as such.
7. “They’re just not here in good faith.”
8. “I’m not going to do their homework for them.” Or, “Nobody gets free discovery.”

9. "It's not the money, it's the principle."
10. "We want them to know we're serious."
11. "We don't want to move too fast, too soon."
12. "They're just not getting it."
13. "We're not going to pay a dime more than the other companies."
14. "But we don't have any more room to move."
15. "They're not moving fast enough."
16. "OK, they moved five, so I'll move five."
17. "This case isn't going to settle."
18. "Let's cut to the chase." (Early in the negotiation).
19. "Tell them we're not going any higher/lower."
20. "Is that really their best number?"
21. "I don't have any more room to move." (Statement made when the end clearly is near)
22. "I'll go to \$xx.xx but only if it'll settle the case."
23. "Let's just go to our bottom line." (Late in the negotiation).
24. "Do you have a suggestion?"
25. "Do we have to go back in there with them again?"

*Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes* is not a philosophical discussion of mediation theory, but a practical "how to do it" book. I have tried some of the tools and techniques Little suggests with great success. The book is available from ABA Publishing, American Bar Association.

© 2011, Sherman D. Fogel. Sherman Fogel is a principal in the Phoenix law firm of Sherman D. Fogel, P.A., and is a past Chair of the Alternative Dispute Resolution Section. He frequently speaks on arbitration and mediation at programs sponsored by the American Arbitration Association and the State Bar of Arizona. He has been selected for inclusion in the 2008 - 2011 lists of *The Best Lawyers in America* in Alternative Dispute Resolution. Mr. Fogel can be reached at 602-264-3330, [mede8@msn.com](mailto:mede8@msn.com) or through [www.shermanfogel.com](http://www.shermanfogel.com).