Book Review: J. Anderson Little, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes* (ABA Publishing 2007)

Review by Margaret M. Huff*

Summary

Making Money Talk by J. Anderson Little gives practical guidance on effectively mediating insured claims and other money disputes where position-based bargaining is almost inevitable. Don't fight against the natural inclinations of advocates representing their clients in mediation. Instead, Andy Little proposes that mediators use facilitative ADR tools in an effective way tailored for monetary disputes.

Tackling the Impasse Problem

Have you ever heard this during a mediation:

- They're not acting in good faith!
- They're trying to make me bid against myself. Do they take me for a fool?
- They're wasting everyone's time. I'm out of here.

Sounds like a discouraging mediation experience that will culminate in impasse. It's a shame that a mediation may fail before the parties have come close to their walk away numbers.

Help is on the way. . . . *Making Money Talk* by Andy Little is for experienced mediators and attorneys who want more effective mediations of insured claims and other money disputes.

About the Author

Andy Little is a mediator, mediation trainer, and national ADR speaker. He contributed to developing ADR legislation and rules in his home state of North Carolina. While serving on his state's Dispute Resolution Commission, he helped draft the Standards of Conduct for Mediators. He wrote *Making Money Talk* after seeing parties and their attorneys frequently become frustrated and then counterproductive in their reactions to settlement proposals in mediations.

Who Benefits from the Book

Making Money Talk gives some models and techniques to help m I'm out of here. ediators deal with specific problems that come up in positional bargaining during monetary dispute mediations. Andy Little wants mediators to overcome the feeling that they are mere messengers in an endless shuttle diplomacy exercise that can leave clients angry, frustrated, and veering toward impasse, rather than moving toward settlement.

In position-based negotiations, each party takes a stance on what he/she wants and argues for it, regardless of underlying needs and interests. Each side starts at a bargaining position with a dollar amount and proceeds to make dollar concessions, in back and forth negotiation. Settlement can be reached only if each side agrees to a compromise dollar amount. *See* Fisher & Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1983).

Mediators, lawyers, and their clients in monetary disputes can learn practical skills from *Making Money Talk*. In many insured claims and other money disputes, the idea of "preserving relationships" is irrelevant. The parties and their lawyers are not interested in exploring the other side's needs and interests. They will balk at the mediator's well-meaning attempts to use the traditional "problem-solving" focus taught at countless ADR seminars. Don't worry about it. Use facilitative mediation skills in a special way in the caucuses, the private meetings where a party and his/her attorney discuss the next move to make in their position-based negotiation.

Quality Mediation Tools

This important book contributes to the national debate on what exactly is a well-executed, quality mediation. Clients do value the persistence of skillful mediators. *See Final Report of the ABA Task Force on Improving Mediation Quality* (American Bar Association 2008) at 17. Does that support the notion that mediators should be directive and highly evaluative, if "that's what the clients want"?

Little has thought through the pitfalls of traditional arm twisting that can occur in mediations of monetary cases. He offers a welcome answer to the question posed years ago by Professor Alfini in *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?,* 19 Fla. St. U. L. Rev. 47 (1991).

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Making Money Talk shows you how to bring effective, ethical persistence to mediations through facilitative skills, without compromising each party's right of self-determination. *See* Standard I, Self-Determination, Model Standards of Conduct for Mediators (American Bar Association 2005) (self-determination defined as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.").

Little argues that the mediator's goal should not be pushing the parties into a forced settlement. Rather, the goal is to help the parties move toward their target numbers in the negotiation process. If a party's evaluation at the end of the day is that the negotiation has not resulted in an appropriate settlement, the mediator should respect that.

But it's unfortunate when a mediation fails before the parties have come close to their walk away numbers. The mediator can use facilitative skills to get the parties back on track if they begin showing danger signs of impasse. Mediator tactics that come close to undue coercion are not necessary.

Another contribution is Little's insight that there are two negotiations in monetary mediations: 1) the negotiation bringing the parties from their starting numbers to their "target or walk away numbers," and 2) "bridging the gap between the parties' best numbers." *Making Money Talk* at 190. Little provides practical advice on bridging the gap after the first phase of the negotiation, rather than declaring impasse.

Contributions to Literature on Practical ADR Skills

I agree with the book's message that you can make traditional bargaining more productive for the parties in three steps that are simple to state, but difficult to achieve:

1. Facilitate the flow of information.
2. Facilitate case or risk analysis.
3. Facilitate movement.

Making Money Talk at 36.

1. Information Flow

How can you improve communication in a money case mediation when the parties may want to hold back information? For example, if the defense team in a tort case has a surveillance tape that would be devastating at trial, they may not want to reveal the tape at the mediation.

Little argues that, "Mediators should never try to sell disclosure as the best or right decision. Lawyer-mediators are often accused of practicing directive mediation in this type of situation . . . . This does not have to be true. If the mediator truly believes the decision to withhold or convey information is the clients' to make, he or she will do everything possible to help the parties make thoughtful and informed decisions and will not insist that information be exchanged." *Id.* at 38. So ask open-ended questions and use other facilitative mediation tools in caucus, to help the parties consider the pros and cons of divulging information.

2. Case/Risk Analysis

Continue in private sessions by "asking questions about probable outcomes and by helping the parties bring their evaluation [of the case and the risks of litigation] to a conscious and verbal level. . . [U]se open ended questions, listening, understanding, summarizing, and reframing. These are the tools of facilitators." *Id.* at 48. Give both sides time to talk in private sessions about the evidence supporting their analysis of the case.

3. Movement

Little's important chapters on movement explain why mediators "should concentrate not on settlement but on eliciting well-thought-out proposals that encourage movement." *Id.* at 83. Parties often miscommunicate in "shuttle diplomacy" mediations that feel like used car sales.

With Little's approach, the parties keep control over the bargaining process, as they choose to progress toward settlement, or at least satisfy themselves that each side has reached his/her walk away number and is not able to bridge that gap during the mediation conference.

Instead of setting the stage for possible impasse, you can coach the parties and their attorneys as they refine their plan for moving from one position to the next during the negotiation. The goal is to prevent negative reactions to monetary proposals by "helping them clarify the messages

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they want to send with their proposals and helping them develop proposals that will convey those messages to each other accurately." *Id.* at 65.

Part of the mediator's job is to help a party overcome an understandable reaction to quit or slow down in response to an unattractive proposal. The mediator can help the party "develop positions that will encourage the other party to keep making substantial movement themselves." *Id.* at 73. If the defense believes that the plaintiff has made an unreasonably high demand, the book suggests facilitative questions to generate a productive conversation in a private caucus, such as: "'What would have been a reasonable number for the plaintiff to begin with?'" *Id.* at 79.

When a party complains, "We won't dignify that with an answer!" or has some other negative reaction to a proposal, the party has actually lost control over his end of negotiation. The party has lost the ability to see many of the options at his/her disposal to encourage the other side to make significant movement. "Having lost control, he puts forth a proposal that succeeds only in driving the other side away and making it impossible to accomplish his own objectives, which is to settle the case." *Id.* at 93.

Again, the mediator can use facilitative skills to get the negotiation back on track by asking what seem to be simple questions and listening carefully to the answers. If timed properly and delivered as a coach (and not a coercive interrogator), the questions become useful tools of the trade in a monetary dispute: "1. What do you want? 2. What are you doing to get it? 3. Is that working? 4. If not, what can you do differently to make it happen?" *Id.* at 93. These and similar questions can help the party focus on goals and objectives during the private caucus, regain a sense of control, generate options, evaluate the options, and take appropriate action during the negotiation.

Some Limitations

Although the book might have included additional information in its chapter on other mediation models, it cites other comprehensive resources on that topic. The short concluding chapter on ethical standards should encourage mediators to learn more from other sources.

Making Money Talk could have covered more on the question of what caucus information is best kept out of a party's proposal to the other side. Conveying a money proposal with additional information to foster movement can backfire.

Consider this caucus scenario where the plaintiff's team privately thinks a car accident tort case should settle for $40-50,000 and the defense privately thinks the case should settle for $28-35,000:

TORT SETTLEMENT
NEGOTIATION SCENARIO

> A Mediator is in caucus with the plaintiff and plaintiff's counsel [after reminding them about the caucus's confidentiality, checking in on any new developments since the mediator last met with them, etc.]. The mediator states: "The insurance company has asked me to present a new proposal to you. They think you should have started the negotiations with an offer of $60,000 rather than $150,000. They think you started outside the ballpark. They want you to consider [summarize facts defense wants mediator to provide, in order to legitimize new proposal from insurance company]. So their new counteroffer is $20,000."
>
> The mediator thinks there are no shortcomings in the above presentation. After all, hasn't the mediator made the money offer "talk" by providing much more than a mere dollar amount counteroffer?
>
> Although the plaintiff originally accepted his/her lawyer's assessment that the case would settle in the $40-50,000 range, the client is now thinking:
> - The insurance adjuster has authority to settle for $60,000.
> - Maybe my lawyer undervalued the case.
> - I don't want to leave money on the table.

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- My next move needs to be way above $60,000. I'll tell my lawyer to offer $120,000.

Here's the danger in the above scenario. The number the plaintiff heard the most was $60,000, not the $20,000 counteroffer. The unintended impact is a major miscommunication, leading the plaintiff to react over-optimistically, perhaps with a new offer that is even higher than the plaintiff's team had planned while the mediator was out of the room. Negotiations slow down. A potential impasse looms, caused by a new form of miscommunication.

Why Read Making Money Talk

Several years ago, I attended Andy Little's seminar presentation where his book was available for purchase. I wasn't planning to buy it. After all, I had paid for an all day seminar based on the book. By the morning break, I knew Little was on to something. I bought the book.

Many see facilitation as generally happening in the joint sessions when all the parties are present. After all, isn't that where you get the parties to brainstorm and evaluate options together? Little turns that concept on its head. Use facilitation skills (open ended questions, active listening, understanding, summarizing, and reframing) in the private caucus sessions. Use the skills to foster movement.

Why use strong arm tactics, or techniques that border on trickery, as a way to move past impasse? There's a better way. Build on the attributes of traditional positional bargaining. Help the parties plan their negotiation and make thoughtful, rather than reactive, proposals. Turn each money offer and counteroffer into a vehicle for clear communication.

Little addresses a number of the standard topics of mediation seminars: asking open-ended questions, using summary statements after engaging in active listening, generating options through brainstorming, and making observations and suggestions about the negotiation process. By placing these topics in the context of a monetary dispute, he brings new life to the subjects, offering specific insights on how to use these tools in money cases.

The book delivers practical advice. Little convincingly explains why he does not ask for the parties' bottom lines; he believes it's unnecessary to know bottom lines to effectively mediate in a money negotiation. *Id.* at 188-89. He points out the importance of having a significant discussion about damages with the plaintiff before getting the first offer to propose to the other side. He includes a chapter on how to handle recurring problems in traditional bargaining (25 settlement conference clichés, including one of my favorites, "'They're just not here in good faith'").

Conclusion

Andy Little has hit a home run with *Making Money Talk*. ADR professionals will benefit from the concise, practical advice on how to foster settlements through facilitative mediation techniques within the framework of position-based negotiations. Mediation clients and their attorneys will learn how to get the most out of their mediator when negotiating a settlement of an insured claim or other monetary case.

J. Anderson Little, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes* (ABA Publishing 2007), www.ababooks.org.
Book Review available on www.MargaretHuffMediation.com.

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