

When Talks Reach An Impasse, Mediators Work Their Magic

By Victoria Pynchon

How many times have you heard yourself say to a mediator — "go work your magic?"

If the dark arts were available to us, you can be sure we'd use them. Still, there are days...

Not that long ago, I was driving downtown for day two of a mediation over a highly emotional landslide dispute between neighbors of decades standing. This case has legs. The first landslide had taken place 30 years before, when one of the property owners was only 7 years old. He vividly recalled helping his uncle shove up the wide yard sloping into a canyon on the valley side of the hill, as well as the acrimony that simmered for years over the neighbor's failure to do the same.

The previous day, there'd been shouting and table-banging by the neighbors and "under no circumstances will we settle this for more (or less) than" directions from the claims adjusters and their legal representatives.

Driving downtown for day two, I switched off the radio to think, looking for a way the parties could restore the priority of their financial interests over their powerful emotional reactions. The claims adjusters had been reasonable and the parties' attorneys knowledgeable and shrewd. These professional dispute-resolvers needed help with the parties — the people.

As the light turned red, my gaze drifted over to the pennies that had been sliding back and forth across the dashboard for several days. "Magic pennies," I thought. That's all. Not, "Hey, I'm going to use these pennies in the mediation." Not, "I wonder if I could get the parties into a more playful state of mind." Just "magic pennies."

As I swung the car to the left, I reached out to capture the copper coins and slipped them into my pocket.

For an Angeleño whose fellow residents seem geographically inclined to crystal-gazing, psychics, consulting or horoscope-reading, I'm pretty hard-headed. More left-brained than right, more rational than emotional and more scientific than magical. Give me the scientific method and a little Western medicine any day of the week in lieu of whatever quasi-spiritual revelation is knocking the celebrities out of their heavens.

Still, I was walking into a commercial mediation carrying magic pennies in my pocket.

You don't even want to know the four-dimensional chess game of this litigation. Suffice it to say that the lawyers and claims representatives have to pretend that K is Q and A is W to create enough insurance coverage to accomplish the desired and most, economical resolution. The mental strain is nothing, however, compared to the depth of the parties' rancor and their willingness — indeed eager anticipation — to cut off one another's noses to spite their faces.

By mid-morning, I'd called a joint session that quickly threatened to wheel out of control. When I put my hand in my pocket, I felt the pennies cool against my fingers. I didn't stop to think. I just started talking.

"I've got these magic pennies," I said, holding them up far enough to see. The room went silent. I mean, completely silent. No one was yet looking at me as if I were nuts, although I was beginning to wonder myself because I still had no clue as to what I was about to say. They call this "intuition" and it works with judges and juries.

Sometimes to give the parties a chance, you need to stick your own neck out.

I pulled an empty Styrofoam cup toward me and dropped the penny in. Then I pushed the cup back to the center of the conference table.

"Remember how we talked yesterday about separating the people from the problem?" I asked. "The cup is the problem." I continued, offering a handful of pennies to the parties, indicating that they should each take one.

"If you put your magic penny into

the cup, it will help you focus on the problem rather than your feelings about the problem."

Everyone was looking bemused. My suggestion was unexpected but not, it seemed, unwelcome.

No one leaned over to put his penny in. Still, and somewhat uncharacteristically, I had the patience to simply wait.

Finally, one of the neighbor parties, Bob, said, "I won't put my penny in until I see Jones put his in first."

This was a good sign. Bob was beginning to make meaning with the penny; he was constructing the penny's relationship to the dispute.

"How will it help?" Jones asked, skeptically eyeing me.

"Whenever your focus shifts back to your feelings," I said, "I'll just juggle the cup a little. I'm not suggesting you shouldn't say how you feel or why you're feeling that way. I'm just proposing that it would help all of us if we were aware of the moments when we're acting in response to fear or anger and when we're thinking about a business solution to an economic problem."

Jones tossed his penny into the cup. I liked that. He was all in.

When Bob followed, they both had to suppress smiles, while glancing at each other sheepishly. It was the first time I'd seen them exchange any gaze that wasn't filled with anger, rancor, suspicion or fear.

I'm no magician, but the pennies helped us reach a settlement that day.

My friend and fellow mediator Jerry Lazar actually is a magician — miraculously settling cases by day and unsettling audiences with close-up miracles at the Magic Castle by night. I wondered what "magical" solutions he conjured up at the mediation table.

"My only trick," he told me, "is to incentivize the parties by slipping a deck of cards on the table at the start of the session. Then I purposefully start shuffling and cutting the deck and unsettling audiences with close-up miracles at the Magic Castle by night. I wondered what

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the youngest child is jaded by these daily experiences.

My fondest wish is that our social evolution keeps pace with our technological progress, so that the peaceful resolution of disputes will similarly become as commonplace as microwaves and mobile devices.

Then it will no longer seem that mystical forces — or card tricks, or magic pennies — are needed to bring together the bitterest of enemies for a common purpose."

After 25 years of commercial litigation practice, Victoria Pynchon joined the Southern California ADR firm Judicate West, where she mediates and arbitrates commercial disputes full time.

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