

How Initial Demands and Offers Affect the Course of the Negotiations

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“Yes, I have tricks in my pocket. I have things up my sleeve. But I am the opposite of a stage magician. He gives you illusion that has the appearance of truth. I give you the truth in the pleasant disguise of illusion.”

Tom Wingfield of Tennessee Williams’ “The Glass Menagerie,” foretells the confusion that arises in mediation when the first move is unrealistic. Does this position speak to the true value or worth of the matter? Is it simply an illusion crafted as a negotiating tactic to hide the true intent?

An unrealistic position is different from an aggressive position. An initial position should not be anointed unrealistic by the mediator. The position may frustrate the mediator’s efforts to facilitate settlement but no good comes from the mediator challenging either party. The mediator should prod and test the position to see if it signals true intent.

An unrealistic position is not synonymous with an unreasonable position. An unreasonable position is simply one where a party is leveraging some perceived advantage. What then is an unrealistic opening position? It is one made with the knowledge that is not productive in moving the matter toward settlement. It is untethered to risk assessment, the needs of the client or respect for the process. The goal of mediation is settlement or at least discovering what will achieve settlement. Every position, from the initial to the last, should inform the process as to the achievability of the goals. The significance of initial positions is that they anchor the negotiations. A mediation framed by an unrealistic initial position, results in a

response in kind. No useful information is provided. Both sides are enveloped in the ether of illusion, no closer to settlement.

Rationalizing the unrealistic position as getting the “ball rolling,” results in a Sisyphean task. It requires a constant effort to push off the weight of the initial impression. There is a constant readjusting of expectations for clients and opposing parties. It frustrates the process and hinders resolution because the “gap is too big.” Whereas the true gap between realistic demands and offers is usually an honest disagreement between worth vs. value.

“The good news is there is light at the end of the tunnel. The bad news is there is no tunnel.” —Shimon Peres

It would be to everyone’s advantage if all parties come to mediation with realistic positions. When that is not the case, deadlock occurs. There seems to be no tunnel, no light, no settlement possible. But there is a tunnel, there is light, there is a chance for settlement if you reframe the discussion. Ignore the unrealistic and provide an offer or demand that signals your view of the case’s worth or value, respect for the process and willingness to work toward settlement. Allow the “unrealistic” party, an opportunity to engage in a productive dialogue. Lecturing another to “be real” or that the proposition is not worthy of a response or giving an equally unrealistic response, hardens the position. It will be viewed as an attack on the individual, particularly if made in front of clients. After all, mediation is fundamentally about human interaction and disparagement does not encourage productive interaction.

How does one reframe the discussion? There are two parts. The first is to deconstruct the opposing party’s unrealistic position. It is not an attack but an effort to understand the basis for the position. It is a Socratic exercise: a form of cooperative argumentative dialogue between the parties, based on asking and answering questions to stimulate critical thinking and draw out ideas and underlying presuppositions. A truly unrealistic position cannot survive long when subjected to questions of “why do you hold that position.” The second part is to tender your position and your foundational reasons for it. You need to also be willing to entertain the other party’s doubts and questions. The Socratic method is not a monologue; but a dialogue.

The quality of interaction at mediation is dependent upon trust of the process, trust of the mediator but, mostly trust among the parties. While there may be preexisting trust, often trust is built a little at a time during mediation through listening.

The mediation can become a filtered conversation with the party representatives. The actual clients may be hearing only positions, unrealistic or otherwise, formed by their own advocacy. The Socratic method gives the mediator tools to drive the mediation discussion with facts, shared arguments and educated positions. It is now not a full discussion on the

merits. The client and party representatives can test the underlying support for their position against that of the other party.

No party has a monopoly on the facts. Each party, however, does have a view of their facts and their truth. Their views and truths form the basis of the story they have come to tell. The extent to which they tell the whole story depends upon the willingness of the other party to listen. What chance can there be for a reasonable and fair settlement if parties only know their side of the story? What chance is there for a reasonable and fair settlement if there is not enough trust to tell their story truthfully? What drives their positions? Openness to the other party's point of view allows finding common ground, identifying disagreements and providing opportunity for persuasion.

"The power of a lawyer is the uncertainty of the law."—Jeremy Bentham

With a nod to Bentham, "the power of a trial is the uncertainty of the verdict." Mediation is a response to that uncertainty. If a fair and reasonable settlement cannot be reached, then the risk of trial is worth the uncertainty. Trial becomes a necessity. Yet the necessity should not arise because unrealistic positions prevent the opportunity to settle.

There is little in this digital age that prevents parties from knowing the law, understanding exposure and risk, creating theories, examining similar results and then monetizing positions to stake out at mediation. Given this, there is no need for unrealistic demands or offers other than a lack of preparedness or desire not to settle. When this happens, mediation is an empty process.

While mediation may be used to set dollar markers, flesh out positions or impress others of your trial commitment, the goal is still settlement. To reach a fair and reasonable resolution, the parties, with the help of the mediator, need to align worth and value. The concepts are not the same. Worth is the cost of an item. Value encompasses emotion as well as cost. It is when worth and value align that a fair and reasonable settlement can be reached. Both worth and value are incompatible with an unrealistic position. A position based on either worth or value can never be unrealistic. An unrealistic position is one anchored in neither worth nor value. Such positions are to be ignored but the process should not be ignored. Responses to such positions need to reframe the discussion along the concepts of worth and value. To align worth and value, all factors need be objectively and reasonably weighed. Liability and exposure cannot be the sole drivers for settlement exclusive of the emotional impact. Nor can emotional impact be the sole driver independent of liability and exposure.

"Things may come to those who wait, but only those things left by those who hustle."—Abraham Lincoln

The unrealistic initial position signals nothing. It provides no information. It provides no opportunity to understand the party's view of the case or the merits of its arguments. It provides no guidance for a response. It offers no reason to trust the story. It erodes trust and credibility. So ignore it, but not the process. Use the process. Reframe the discussion. Control the negotiation. Stay at the table. If progress is slow, so be it. If it ends poorly, it does not end forever. Always leave the door open to return.

Why shouldn't unrealistic first positions make you abandon optimism? Because even the darkest night cannot hold back the light of dawn. Even the most unrealistic position cannot hold back self-interest of the parties. There is a reason that most cases settle short of a verdict. Parties come to the realization that trusting a verdict is not the next best alternative to a fair and reasonable negotiated settlement. Clients may take comfort in their lawyers' estimation that there is an eight out of 10 chance of a favorable verdict at trial. But, if the verdict is adverse, the client's reality is 100% unfavorable. It is that reality that mediation avoids.

Mediated settlements can survive initial unrealistic positions. It requires the ability to ignore and engage. To ask and be asked. To concede when it is right to do so, to stand fast when one should. It takes openness and patience. It takes a willingness to advise the client when trial is or is not the best option. After all, what is more effective than a credible trial threat to cause the magician to empty his pockets and have illusion give way to truth.

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