Broken Halos: The Goal of the Mediator is to Balance Assessments

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Seen my share of broken halos Folded wings that used to fly They've all gone wherever they go Broken halos that used to shine

—Chris Stapleton

How is it that the expectations of parties to an action can be so different? Can it be the law and facts are unknown to one party? Or can It be that parties are not abstract representatives of a side but human beings. People having deeply held values, with different backgrounds and viewpoints. Expectations may arise from a sense of being wronged, or the need to seek justice or vindication. Emotional investment is a hallmark of almost every lawsuit. Particularly in personal injury cases involving trauma, pain and emotional upheaval. There are underlying emotions that makes putting a price on the injury often feel incongruous and unsatisfying and lead to "unrealistic" demands. The emotional aspect is not reserved to the injured party but also underlies the response of the party accused of wrongdoing. To be "accused" is an attack on the integrity, self-worth, resources and behavior of the person so accused or the company the person may represent. Is it therefore unexpected that a demand be labeled "unrealistic?"

Accepting human nature may drive expectations one would expect a tempering effect by the facts and laws. Surely that is the common ground. Yet, it is a shaky ground. How facts are perceived by a party is influenced by the halo effect. Because human social perception is a constructive process when a person forms an impression of a case they do not rely solely on objective information.

Instead, they actively construct an image of the case based on what they already believe. The effect is akin to the confirmatory bias which is a cognitive bias that people tend to believe information that is consistent with what they already believe and dismiss as false that which conflicts with their existing beliefs. Expectations that are born within the glow of the halo, if not unrealistic, often prove unmanageable and unreachable.

Experienced lawyers intuitively and learnedly understand the emotional and cognitive influences discussed above. They can do much to color the picture their client sees, both of the process and of its possibilities. Yet, because of the significant challenge in actually influencing beliefs the lawyer must balance difficult assessments without appearing weak or less committed to the client's cause. This balancing is the art of lawyering and the work of mediation.

I would rather be a thorn in the side than an echo.

—Ralph Waldo Emerson

"I have a great case; I can not lose; I should not settle for a penny less than what I am asking for." These expressions of hubris by parties are not uncommon in mediation. They are expressions of deeply held convictions. These statements exhibit a conflict that is emotional and can't be resolved by mediation. They need however to be managed so as to not frustrate the dispute that is fact based and the focus of a hoped-for resolution. Listen. Mediation is about the parties. People need to tell their story and vent. There is no position to be taken by the Mediator nor countervailing argument to be brought forward, Empathy is called for not employment of the Socratic method. Let the process work. Allow the time to pass. It is productive. It is useful. It is the party's time to finally be heard in a forum without censorship of their feelings.

Just as mediation won't resolve the emotional conflict it won't do justice. Mediation is not for justice as perceived by the injured party or the one accused of causing injury. Mediation is for settlement. In the personal injury context that is settlement upon an agreed dollar amount. What is an agreed dollar amount? It is the value of the case as seen by both sides. How is the value arrived at? By gut feeling, historical data, verdicts and settlement in like cases and overlap in the evaluations of the parties. The rub in mediation comes as to the overlap. Influenced by their past success, lack of success, client expectations, jurisdictional and judicial advantage or halo view of the fact and law, lawyers differ in the ultimate dollar amount at which the case should settle. Which is OK. The problem is when they differ in value range. If there is no overlap in ranges, there is no opportunity for settlement. If there is no overlap one party has evaluated the case wrongly. That is a signal each side should re- evaluate and if not, then for a jury to decide.

Mediation can help lay the foundation for re-evaluation but that would take reflection by the parties over a more extended period of time usually afforded a mediation. However, within the mediation context, whether there is overlap of value ranges or not, the process benefits by the mediator acting more than as an echo. A mediator is not a parrot mimicking what is heard. A mediator is not a wall bouncing back what is thrown. A mediator is not an echo. A mediator is a thorn in the side. A mediator need not evaluate the case or take sides to effectively move parties. Talking about the position of the opposing party and arguments being made is a subtle form of mediator advocacy for movement. Lawyers certainly know the strengths and weaknesses of their case, but a mediator's voice adds a suggestion as to how a jury may view the facts and arguments. Not a dagger to the heart, nor a bludgeoning, but a thorn to the side. A bit uncomfortable, something not to be ignored but to be considered.

Doubt a little of your own infallibility.

—Benjamin Franklin

Unless asked, and asked earnestly, mediators should avoid offering their own personal evaluations on cases while engaged in mediation. What the terms of the settlement may be is not for the mediator. What is for the mediator is the shaping of a settlement based upon the compromises and negotiations of the parties. A mediator who makes a valuation has decided the value of the case and set a Rubicon neither party may wish to cross. It is ego driven enough to presume one can influence the settlement of a case. It is beyond ego to think, with mediation memo in hand, one can better value the case than the parties. This is not to suggest a mediator need avoid expressing how testimony, facts or arguments may resound with or may impact a jury. It is a caution. A mediator should be wary of having an undue influence upon the client. A mediator needs to step lightly for danger of usurping the role of the lawyer.

Certainly, a mediator can suggest brackets for settlement. They are based upon party positions. The search is for overlap of settlement ranges. Likewise, a requested mediator's suggested number can be useful. A mediator's number is not the mediator's valuation of the case but a number the mediator thinks will bridge the gap and allow settlement. Such a number is based on party positions and allows for movement neither party would first take or the push a lawyer needs to move the client.

Alas, some cases remain at impasse. It is not a natural state. It is against the self interest of the parties to remain at impasse. How to break it? Time and reflection. The adversarial nature of litigation will chip away and tarnish even the most unchecked of expectations. The inconvenient facts once ignored will dim the glow of the halo and brighten reality. At the end of the day compromise trumps intransigence.

As the U.S. Constitution was being debated, Benjamin Franklin found not everything to his liking. Yet, he pushed for compromise. Franklin awakened to the understanding that views which differed from his were not personal attacks nor inherently wrong. That differences should be embraced for their merit and not dismissed because of the spokesperson. Each advocate should be willing to embrace the possibility of being less than infallible. The delegates then accepted the Constitution with near unanimity.

I have experienced many instances of being obliged, by better information, or fuller consideration, to change opinions even on important subjects, while I thought right, but found to be otherwise. •

Ed Gray, *of ADR Options, brings four decades of experience as a trial lawyer where he tried 63 catastrophic injury cases to verdict, to his role as a mediator and arbitrator. He has conducted dozens of mediations and arbitrations virtually. For more information, visit* https://adroptions.com/neutral/edward-gray-esq/.