

# Uncertainty Drives Conflict Resolution

After many years of mediating litigated cases, I find that several threads continually recur. Among the most pervasive are the following:

- Attorneys believe that their analysis of the case is superior to that of their opponent
- Parties believe that the opposing party is insincere in his/her/its position
- Attorneys believe that the opposing witnesses will be surprised by certain evidence when directly confronted by it at trial
- Attorneys believe that they will be able to communicate the “gestalt” of their case to a jury far better than opposing counsel will his or hers

## **A. Any dispute can be settled at any time**

This is a very straightforward concept. Let’s take a personal injury case in which an injured plaintiff is demanding \$150,000, but in which the defendant is not willing to pay more than \$25,000. Now, let’s assume that we are totally omniscient and can, with absolute certainty, know what the result will be after trial.

In Case 1, the trial court awards the plaintiff \$125,000. Now, given the costs involved in getting to and through trial in order to reach that result, I would expect that, at an early mediation, armed with the knowledge of the outcome, plaintiff might be willing to accept \$100,000, believing it to be a better overall result than he/she would get at trial. And, in the same vein, defendant might be willing to pay a premium, say \$140,000, to avoid spending additional defense costs knowing the final outcome. As a mediator, I would know that I had a zone of about \$40,000 within which the case would have to settle. Life would be good.

In case 2, the trial court defenses the case. Now, given the same analysis, plaintiff will take anything he/she can get in settlement. Similarly, defendant might be willing to pay anything less than cost of defense, looking upon that as an overall savings. Cases like this often result in a walk away, since continuation of the litigation would be as costly to one side as the other. Again, life is good.

The point is clear: If the results were known in advance, mediation would be unnecessary; the cases would settle themselves. In that scenario, the only reason that a case might not settle would be because one or both sides made their decisions on an economically irrational basis, such as anger, revenge, or other such factors. Does this happen? It does, and it happens often. But that’s another topic for a different article.

## **B. Dispute participants are unduly optimistic**

This is an inherent and totally predictable facet of our adversarial system. When I convene a mediation, I expect all participants to be unduly optimistic. Those who are not are truly the exceptions, in my experience.

#### **a. Attorneys**

It is a rare litigator who is not in love with his or her work. I certainly fell into that category during my courtroom days. I often wonder whether or not a litigator without that trait could be the best possible advocate. But, while perhaps a necessary component of the best litigators, it has two unintended consequences. First, the litigator will give him or herself a better chance of winning than that of an “average” litigator handling the same case. Second, the inherent optimism of the litigator, even if tempered with cautious words, often, sometimes invariably, is transmitted to the client.

#### **b. Parties**

To start with, parties believe strongly in their positions. At least, that’s my hope. And, just as hopefully, they believe in their attorney(s). Prudent attorneys always temper their language in order to avoid giving their clients any false optimism about their likelihood of success. But as we all know, many clients read optimism “between the lines,” in their attorney’s demeanor, or in any other way that justifies their own need to be optimistic. And, of course, this optimism can be further buoyed at various times, such as at deposition, where the attorney will take a particularly vigorous position as advocate.

### **C. Settlement value**

For the purpose of this article, I am using the simpletonian method that I always used in my own practice: value times percentage of success. Using this method, a \$50,000 case with a 50% chance of success, for example, has a settlement value of \$25,000. Similarly, a \$100,000 case with a 25% chance of success also has a value of \$25,000.

### **D. The Index of Over-Optimism**

This is a tool that I developed myself that has been useful in my own evaluation of the status of the mediation. Initially, I ask each attorney to tell me, privately of course, what his or her opinion of the likelihood of success at trial is. Keep in mind that I believe that “slam dunks” win, at best, 75-80% of the time. I then take the two numbers, add them together, and have my Index of Over-Optimism.

The lowest reasonable number would be 100%. That would be when each attorney measures the likelihood of success at 50%. In that case, the only

difference would be in the valuation of the case itself, a straight distributive issue that, while challenging, would certainly be simpler to address than would inflated expectations.

More typically, the Index ranges from 120% to 160%. I've even had a case in which both attorneys felt 90% sure of success at trial, for an index of 180%. The Index is a measure of the degree of difficulty presented in the mediation *based on the evaluation as stated by the attorneys themselves*. I emphasize this because too often the percentage given does not reflect the true opinion of the attorney, but rather what the attorney wants the mediator to think. As the mediation goes on, the mediator should adjust the Index as developments change the "lay of the land."

### **E. The job of the mediator**

Even when all of the foregoing information is absorbed and understood, the challenge of putting it into effect remains. This is where the experienced mediator will transcend the basic training and call on his or her years of experience to use the knowledge and seal the deal.

#### **a. Getting beyond the numbers**

Emphasizing the costs of litigation is something that every mediator is taught to do in the first hour or two of training. It's a valuable tool, but as we all know, it's a very limited one. It doesn't work very well with parties who don't put a value on the costs, insurance companies in particular, and it may not work at all in cases in which substantial sums are at issue. And there's a certain amount of resistance to this pitch, since almost all litigators have heard this argument hundreds of times already and already discussed it with their client(s). When you can resolve a case based on the costs of litigation, that's great. When you can do it on the costs and other elementary tools, that's great, too. But what happens when you cannot?

#### **b. Feeding the fire**

The primary reason attorneys are anxious to mediate, regardless of what they say or how they act out the outset of the session, is because, when all is said and done, they're uncertain of the result. Paradoxically, the more certainty they've shown up to that time, the more worried they often are about the potential of failure and how their client will react were that to occur. My own favored technique is to use personal anecdotes to relate to the latent fear of failure in a similar situation. However you do it, the goal is to reinforce the fact that nothing is certain and that good attorneys are always bullish. A bit of devil's advocacy never hurts, either.

In a similar fashion, many parties have never had a reality check *from a disinterested third party* prior to the mediation. In my experience, even after a reality check performed in a gentle manner, many parties emerge shell-shocked. I've watched them whisper to their attorney, and the attorney whisper back, audibly, "I've been telling you that all along, but you wouldn't listen." It happens all the time.

After feeding the fire, I find it best to step back and mollify a bit. Rather than press the issue, I tell the participants that, after all, they might prevail in the end, but, on the other hand, this might be an opportune time to cash out.

### **c. Forging the deal**

All of the foregoing activity will often take place within the first hour or so of the process, and continue intermittently as the mediation moves forward. The deal will be forged against the backdrop that has been created through your exploitation of uncertainty. Yes, the costs of litigation, the emotional toll and all the other factors will still play a major role in your pitch, but the context in which it is received is, I think, the overarching factor in whether or not the case will settle.

In my experience, the more uncertain the attorneys and parties are about the outcome in court, the more amenable they will be to all the other solutions available to them in mediation. These solutions can include simple distributive negotiation, a mediator's proposal, creative construction of terms, or anything else that works for the parties.

The point to take with you is this: A party that feels certain, that it has little to lose, will feel that it has little motivation to go that extra step that invariably makes mediation successful. Your job is to dispel that certainty!

## **F. The mediator's toolbox in practice**