

# MANAGING THE MEDIATION PROCESS: REACTIVITY, DELUSION AND STANDING IN YOUR OWN WAY OF REACHING A DEAL

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## Introduction

Forty-one years ago, attorneys faced a dilemma: only about ten percent of all lawsuits were actually making their way through the ordeal of litigation to trial. The rest were ending up in a negotiated settlement but only after considerable wasted resources. In essence, one hundred percent of our lawsuits which collectively consumed billions of dollars in transactional costs each year were getting poured into a process that ultimately resolved ten percent. Today, the percentage of civil lawsuits that go to trial has dropped to about three percent. According to American Judges Association, as many as 97 percent of civil cases that are filed are resolved other than by a trial.<sup>1</sup> While some of these cases are dismissed or are resolved through other means, the vast majority of the cases settle.

What happened to the other ninety percent, in which parties genetically predisposed to fight were trying to negotiate a resolution in the middle of the ritualized combat of litigation. Easy to guess. In the arena of civil litigation, the resulting economic carnage was staggering. The cumulative transactional costs of litigation – our national “civil disputation budget” was beginning to rival our annual investment in education and infrastructure. Back in the 1970s, Antonio Piazza, a lawyer turned mediator came up with a theory: what will happen if we introduce a single new factor into the dynamics of litigation?<sup>2</sup> Forty-one years later, we now have the results of what has become, in effect, a long-term validation study of that theory.

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<sup>1</sup> J. Barkai, E. Kent, and P. Martin, *A Profile of Settlement*, Court Review, Volume 42, Issue 3-4,

<http://aja.ncsc.dni.us/courtrv/cr42-3and4/CR42-3BarkaiKentMartin.pdf>

<sup>2</sup> In the 1970s, mediation was mostly used for family law cases. For most attorneys, it was a novel concept to apply mediation to complex commercial cases.

Through the San Francisco, CA office alone, more than five thousand lawsuits have been channeled through a mediated negotiations process. These disputes have encompassed multiple active parties, complex legal and factual issues, diverse nationalities and cultures and amounts in dispute ranging in some cases into billions of dollars. All of these disputes spent time in the spin cycle of litigation and frustrated the best efforts of seasoned lawyers and business leaders to negotiate terms for settlement. All walked in the door with the parties far apart – millions to billions of dollars apart. Consistently, year after year, eighty to ninety percent have walked out the door with a resolution most often after a single day of mediation. This begs the question – what changed in that one day?

How could it be that the same decision makers, faced with the same factual and legal issues ended up with a dramatically different outcome? I believe the answer lies in the shift from dialectic to dialogue. If that is true, it holds open the possibility that we can do a dramatically better job managing those of other, less “civil” disputes that threaten to rip apart the fabric of our society.

There is a dearth of research related to how reactivity in a negotiation affects and becomes a barrier to resolution. This paper focuses on that shift from dialectic to dialogue and the possibilities it opens up for settlement. It explores the mediation process and what individuals can do to better manage conflict.

### **Cognitive Bias Drives Reactivity**

Cognitive bias are systematic deviations from normative models that prescribe rational behavior, as articulated by game theory and other normative principles.<sup>3</sup> Cognitive bias result from information-processing heuristics, such as framing, anchoring and overconfidence. There is a myriad of complex variables that feed into a negotiation. In my experience, non-monetary terms can be as important as monetary terms. In any given negotiation, we are trying to solve for how do we engage with and understand each other in a way that leads to better understanding and agreements such that we can walk away with an agreement we can all live with? Negotiation

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<sup>3</sup> Leigh Thompson, Margaret Neal, and Marwan Sinaceur, *The Handbook of Negotiation and Culture* (2004, 1<sup>st</sup> Ed.)

is about human interaction. How you articulate or structure a proposal can be as important as what you are proposing.<sup>4</sup>

### **Underestimating Your Risk: Framing**

The concept of framing in negotiation describes the way our offers strongly affects how others view them.<sup>5</sup> The fundamental predication of a settlement position is based on people's evaluation of a given prospect using their own reference point defining what possible outcomes could be. The framing effect is relevant to negotiators because it implies that when a negotiated agreement would lead to a certain outcome but the negotiator's best alternative to a negotiated agreement (BATNA) will lead to a probabilistic outcome (or vice versa), the strength of the negotiator's preference for reaching an agreement, and thus his reservation price, will likely depend on whether he views the alternative as potential gains or potential losses.

In a negotiation, parties are influenced not only by their own frames, but also by others' communicated frames.<sup>6</sup> Negotiators often learn about their counterpart's frame through information exchange during the negotiation process. This is a crucial part of a negotiation. Relying solely on one's own frame without meaningfully evaluating others' frame severely limits the ability to reevaluate one's own position. More importantly, without meaningful information exchange, there simply is no basis to reevaluate one's own settlement position. In mediation, it is an opportune time to hear the other side's position and rationale, the mediator's input, and any

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<sup>4</sup> Deepak Malhotra, *Negotiating the Impossible: How to Break Deadlocks and Resolve Ugly Conflicts* (2016).

<sup>5</sup> Margaret A. Neale and Max H. Bazerman, *Negotiating Rationally: The Power and Impact of the Negotiator's Frame*, *The Executive*, Vol. 6, No. 3, pp. 42-51 (Aug. 1992). For example, research by Max Bazerman, Margaret Neale, and Tom Magliozzi finds that people tend to resist compromises—and to declare impasse—that are framed as losses rather than gains. Suppose that a company offers a recruit a \$20,000 increase over her current salary of \$100,000. This offer same offer of \$120,000 is more likely to appeal to her than an offer framed as a \$30,000 decrease from her request of a \$150,000 salary. Stressing what the other party would gain rather than lose is an important form of framing in negotiation.

<sup>6</sup> C.K.W. de Dreu, B.J.M Emans, and E. van de Vliert, *Frames of reference and cooperative social decision-making*. *European Journal of Social Psychology*, 22(3), 297–302 (1992).

new reference points that should be factored into your evaluation of your case. This in turn will help you better articulate your risks and translate those risks into options for settlement.

When you are framing settlement options, consider how you frame the negotiation and factor in optics. Mediators control the frame of the mediation to shape how negotiators will evaluate options to decide what is acceptable. I was mediating a deal between two companies who are leaders in their industry. The plaintiff company sued the defendant company for trade secret misappropriation, breach of contract, and a variety of other issues. There were two issues driving the delta between the parties resulting in a gap of forty million dollars. Often times, at this point in the negotiation, many would cease negotiating. After all, how do you close the gap of forty million dollars? I believe that this is when our role as mediator begins. At this point in a negotiated mediation, advocates should weigh in with creative options or refine options put on the table by the mediator.

Once I understood that there were two issues driving the disparate evaluation and that they had pending motions on both those issues, I asked each side how many times out of ten would they win each motion? In confidence, each side told me that nine times out of ten, they would win on both pending summary judgment motions. Given the fortitude represented by both sides, I proposed a mediator's proposal of ten million dollars upfront (the amount defendant was willing to pay) plus an additional fifteen million dollars if they win on the summary judgment motion on one issue and an additional fifteen million dollars if they win on a second summary judgment motion on a second issue. This allowed me, as mediator to dangle forty million dollars in front of the plaintiff. In contrast, for defendant, it was also an easy sell; in effect defendant would only be on the hook for the ten million dollars they put on the table since they vehemently believed they would win both summary judgment motions. Conversely, for plaintiff, they told me the exact inverse: they would win nine times out of ten on the pending summary judgment and therefore by their logic, they would be entitled to the forty million dollars. This proposal not only met the needs of both sides but tested the courage of their conviction by

asking them each to gamble on the two issues that were driving the delta between the two parties. Without a rational and vigorous discourse of the issues, as mediator, I would not have been able to discern the two issues driving such disparate evaluations and thus, would not have been able to craft a creative proposal for settlement.

### **Negotiation Limited by Anchoring**

Anchoring is an attempt by one party to establish a reference point (anchor) around which negotiation will revolve. The challenge for the party making the initial offer or demand (the anchor) is their ability to adjust his or her assessment of value sufficiently when they learn new data, information or frames. In a negotiation, potential anchors are ubiquitous.<sup>7</sup> They can be as relevant as previous negotiation numbers or as irrelevant as a random aim high number. Anchors when combined with reactivity can create an impasse that causes the parties to be more inclined to shift their losses and treat gains to the other side as losses to their side.<sup>8</sup> Typically coined as “you win – I lose.” To use anchoring to your advantage, you must decide what your goals are and balance that with what is practical and realistic to sell to the other side. If you ask the mediator to ferry an offer or a demand that you know the other side won’t accept, you will lose leverage that can irreparably damage your settlement position.

Settlement numbers are ripe for “anchoring.” The anchoring effect is a cognitive bias that describes the common human tendency to rely too heavily on the first piece of information offered (the “anchor”) when making decisions.<sup>9</sup> In mediation, if we trade offers

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<sup>7</sup> Max H. Bazerman, *Negotiating Rationally* (1994).

<sup>8</sup> Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 1 115 (1999).

<sup>9</sup> During decision making, anchoring occurs when individuals use an initial piece of information to make subsequent judgments. Once an anchor is set, other judgments are made by adjusting away from that anchor, and there is a bias toward interpreting other information around the anchor. For example, the initial price offered for a used car sets the standard for the rest of the negotiations, so that prices lower than the initial price seem more reasonable even if they are still higher than what the car is really worth

<https://www.pon.harvard.edu/daily/negotiation-skills-daily/the-drawbacks-of-goals/>

and demands, I often find parties so rooted in their initial number, it becomes exponentially more difficult to move them off their initial position. As such, it is usually more effective to discuss substantive issues, present the risk profile to start providing a reasoned basis for reevaluation. Because the time a mediator has to spend with the parties is precious and because parties can get lost in the forest for the tree (and lose focus), mediators must avoid the temptation to dazzle parties with their footwork by hitting on every conceivable point they might have to litigate. Instead, mediators should focus in on the practical risks that can in turn be factored into the party's evaluation of their issues and ultimately, their settlement position.

### **Negotiations Limited by Overconfidence and Self-Serving Bias**

People overestimate their abilities and therefore estimate risks will be less likely to happen to them than to others.<sup>10</sup> In any negotiation, the ability to objectively assess one's own risk is blurred by strong emotions and stress decreasing the chance of settlement. There is a strong statistical link between bias and no settlement.<sup>11</sup> What explains the finding that plaintiffs tend to interpret uncertain and conflicting litigation facts as supporting their position whereas defendants tend to view the same facts as supporting their position? One theory is that people are selective in the attention they pay to various facts, focusing more on the facts that support their position than on those that undermine they position.<sup>12</sup> The second theory is overconfidence. Most negotiations believe they are more competent than their opponents.<sup>13</sup>

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<sup>10</sup> Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 *SCIENCE* 1232 (1989): People engage in systematic overconfidence in the judgment of risk believing that they are less likely than the average person to befall risk. When asking couples to evaluate the percentage of the shared housework they complete individually, there is an extremely high likelihood that between the two, the total percentage will equal more than 100% because each is overvaluing his or her own contribution to the work. See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*. 11 *J. ECON. PERSP.* 109 (1997). The only group of people who accurately judge risk based on their own capacities are the chronically depressed.

<sup>11</sup> Russell Korobkin, *Negotiation: Theory and Strategy*, (2014, 3d ed.).

<sup>12</sup> *Id.*

<sup>13</sup> Russell Korobkin, *Negotiation: Theory and Strategy*, (2014, 3d ed.); Roderick M. Kramer, et al., *Self-Enhancement Biases and Negotiator Judgment: Effects of*

I have seen firsthand that self-serving bias hinders attorneys and decisions makers ability to make rational decisions. Self-serving bias indicates that people think they deserve more than other people think they do. In one mediation, the plaintiff, a doctor and inventor sued a large multi-national pharmaceutical company. After a decade of litigation, three trials, two appeals, and multiple mediations, we, as mediators were able to get the pharmaceutical company to put mid-eight figures on the table (no easy feat). It took many hours of substantive dialogue to move the pharmaceutical company from low eight figures to mid-eight figures. Because we believed this option was truly the best plaintiff doctor was going to get especially as transactional costs were already in the eight figures, we encouraged, and urged the plaintiff to settle. In caucus with plaintiff, in addition to substantive conversations, we termed any victory to be a pyrrhic victory given the transactional costs involved. More importantly, the mental, emotional and physical toll of another decade of litigation could simply not be worth betting on the uncertainty of continuing litigation. At the conclusion of the mediation, the doctor said, “hit me, I will take my shot at trial.” He was eviscerated with a jury verdict in the low six figures. Please be warned that self-serving bias can fatally harm one’s ability to effectively manage negotiations.

### **Reactive Devaluation: A Barrier to Conflict Resolution**

When adversaries seek to settle conflict through negotiation, they are usually ready to make concessions, such as forfeiting valued resources or opportunities, provided that they can receive concessions that they value even more.<sup>14</sup> This barrier is referred to as reactive devaluation. This is true even when such a “mutually-acceptable-in-principle” proposal can be formulated, there may be an additional barrier to be overcome, one that arises, at least in large part, from the dynamics of the negotiation process.<sup>15</sup> It refers to the fact that the very offer of a particular proposal or concession—especially if the offer comes from an adversary—may diminish its

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*Self-Esteem and Mood*, 56 *Organizational Behavior & Human Decision Processes*, 110, 118 (1993).

<sup>14</sup> L. Ross, & C. Stillinger, *Barriers to conflict resolution*, *Negotiation Journal*, 7(4), 389–404 (1991), <https://doi.org/10.1111/j.1571-9979.1991.tb00634.x>

<sup>15</sup> M. Deutsch, P. T. Coleman, & E. C. Marcus, *The Handbook of Conflict Resolution: Theory and practice*, (2d ed., 2006).

apparent value or attractiveness in the eyes of the recipient.<sup>16</sup> In a survey of opinions regarding possible arms race reductions by the United States and Soviet Union, respondents were asked to evaluate the terms of a nuclear disarmament proposal, a proposal that was allegedly initiated by either the United States, Soviet Union, or a neutral third party.<sup>17</sup> In all cases, the proposal was identical; however, reactions to it depended upon who allegedly initiated it.<sup>18</sup> The terms were seen as unfavorable to the United States when the Soviets were the initiators, even though the same terms appeared moderately favorable when attributed to a neutral third party and quite favorable when attributed to the United States.<sup>19</sup> This case exemplifies the concept of reactive devaluation, which is a tendency for a party to undervalue an offer just because it was the other party who offered it.<sup>20</sup>

Reactive devaluation as applied to a typical negotiation context has been explored by Curhan, Neale and Ross (2004) who demonstrated that failure to reach an agreement can be traced back to reactive devaluation.<sup>21</sup> Two techniques helped to prevent reactive devaluation. First, asking negotiators to assign a rating to a variety of proposals reduced reactive devaluation by motivating negotiators to remain consistent with their original assessment even after one of the previously rated proposals is endorsed by their opponents.<sup>22</sup> Second, asking negotiators to have a general discussion about the issues on the table, without making any proposals or offers also reduced reactive devaluation.<sup>23</sup> By engaging in dialogue, the parties refrained from immediately counterpunching because they were

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<sup>16</sup> *Id.*

<sup>17</sup> L. Ross, & C. Stillinger, *Barriers to conflict resolution*, *Negotiation Journal*, 7(4), 389–404 (1991). <https://doi.org/10.1111/j.1571-9979.1991.tb00634.x>

<sup>18</sup> M. Deutsch, P. T. Coleman, & E. C. Marcus, *The Handbook of Conflict Resolution: Theory and practice*, (2d ed., 2006).

<sup>19</sup> S. Oskamp, *Overconfidence in Case-Study Judgments*, *Journal of Consulting Psychology*, 29(3), 261–265, (1965), <https://doi.org/10.1037/h0022125>

<sup>20</sup> M. Deutsch, P. T. Coleman, & E. C. Marcus, *The Handbook of Conflict Resolution: Theory and practice*, (2d ed., 2006).

<sup>21</sup> J. R. Curhan, M.A. Neale, & L. Ross, *Dynamic valuation: Preference changes in the context of face-to-face negotiation*, *Journal of Experimental Social Psychology*, 40(2), 142–151. (2004). <https://doi.org/10.1016/j.jesp.2003.12.002>

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

able to unearth needs and priorities which led their counterparts to subsequently make more charitable attributions.<sup>24</sup> It is this shift from dialectic to dialogue that allowed for the possibility of settlement.

As conflicts escalate, it perpetuates itself by such processes as autistic hostility, self-fulfilling prophecies, and unwitting commitments.<sup>25</sup> Autistic hostility involves breaking off contact and communication with the other; the result is that hostility is perpetuated because one has no opportunity to learn that it may be based on misunderstandings or misjudgments or to learn if the other has changed for the better.<sup>26</sup> I have seen this happen firsthand in a joint session. When two or more parties have been entrenched in a ritualized combat of litigation, each side believes they fully understand the arguments the other side will make. This is usually because they have spent years working on the same matter. Yet when the mediator cogently summarizes back the opening statement of one side, and all are listening, I have seen the other side hear for the first time their opponent's position. That is how pernicious the forces of reactivity can be.

### **Self-fulfilling Prophecies: A Barrier to Conflict Resolution**

Self-fulfilling prophecies can be an impediment to settlement. It is when you engage in hostile behavior toward one another because of a false assumption that the other has done or is preparing to do something harmful to you; your false assumption comes true when it leads you to engage in hostile behavior that provokes the other to react in a hostile manner to you.<sup>27</sup> This escalating and destructive dynamic forecloses any possibility of a resolution because each side roots into their position without any possibility of a substantive dialogue that would allow for a reevaluation of their settlement position.<sup>28</sup> As a result, both sides think that the other side is provocative, untrustworthy and

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<sup>24</sup> M. Deutsch, P. T. Coleman, & E. C. Marcus, *The Handbook of Conflict Resolution: Theory and practice*, (2d ed., 2006).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

malevolent so any opportunity to come up with creative alternatives to a negotiated resolution is upended.

In the case of unwitting commitments, during the course of escalating conflict the parties not only overcommit to rigid positions but also may unwittingly commit to negative attitudes, perceptions, beliefs, defenses against the other's expected attacks, and investments involved in carrying out their conflictual activities.<sup>29</sup> After a protracted conflict, it is hard to give up a grudge, to disarm without feeling vulnerable, as well as to give up the emotional charge associated with being mobilized and vigilant in relation to the conflict.

Almost everyone has experienced conflict. From their own life experiences, many people have developed some of the component skills involved in managing conflicts including constructive conflict resolution and building rapport.<sup>30</sup> The challenge is that some people don't recognize that they have these skills nor are they aware of how to most effectively utilize them in a conflict situation. As a negotiator, if you allow self-fulfilling prophecies to infiltrate the negotiation process, you will preclude value creation and potentially destroy bargaining relationships.

### **Emotional Bias**

Although our main motivation of resolving a conflict is to get our own interests met as efficiently as possible, humans actually tend to be "quasi-rational", meaning that they engage in departures from "standard economic assumptions."<sup>31</sup> Emotional forces that drive people in a conflict can be so powerful that they take over rational decision making.<sup>32</sup> Emotions drive us much more than rationality even though we continue to believe that we make decision on the basis of pure, detached, objective logic. Our

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Christine Jolls, Cass R. Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1502-04 (1998) (Individuals do not always choose the option that makes the most economic sense, but deviations from assumptions based on economics can be predicted systematically.)

<sup>32</sup> Daniel Shapiro, *Negotiating the nonnegotiable: how to resolve your most emotionally charged conflicts*. (2017).

emotions are often exaggerated when we are bargaining under the stress and uncertainty of litigation. Instead of focusing on goals, interests, and needs and effectively communicating, emotions can shift focus to punishment, revenge, and retaliation. This shift devolves any chance of settlement; deals fail, goals are unmet, judgment is clouded and therefore, needs are not met.<sup>33</sup>

The first step toward dealing effectively with emotions of others is to recognize when they are being emotional – no easy feat.<sup>34</sup> Ask yourself whether the other person has acted against his or her own interests, needs, and goals. You have probably watched people do exactly the opposing of what benefits them. You ask yourself, “what’s wrong with them? Can’t they see this won’t help them?” The reality is once they become emotional, they lose focus on their goals and needs, and they cannot listen nor analyze rationally.

In mediation, I often analogize the ritualized combat of litigation to a bar brawl. Two presumptively rational actors get into a fight and they cannot see all of the collateral damage surrounding them because their tunnel vision blurs all of the peripheral damage. Get the other side to listen, which is the only way you can unearth what it is that is getting in the way of reaching of deal. And more importantly, how to deal with what is standing in the way of a deal. The best negotiators are problem solvers who can find new, creative, and better ways to solve both their problem and the other side’s problems. You cannot meet your goals unless you can identify and solve the specific problems standing in the way.<sup>35</sup>

### **The Limits of Position Bargaining**

Position bargaining creates incentives to stall a settlement. When negotiators bargain over positions, they tend to lock themselves into those positions.<sup>36</sup> The more you defend, argue, or clarify your position, the more entrenched in that position you will

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<sup>33</sup> Stuart Diamond, *Getting More: How You Can Negotiate to Succeed in Work and Life* (2010).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> William Ury, *Getting to Yes* (2d, 1992).

become. By becoming more committed to your position, you have created the need to “save face” which makes it less likely that any agreement will be reached that could reconcile the parties’ interests.

There are certainly issues and situations that warrant position bargaining. When there are not a lot of moving parts or complex nuances, position bargaining can absolutely help bring a resolution between two parties. These situations include buying a car, fender benders, or landlord/tenant disputes. However, when there are multiple parties, cultures, and complex issues, position bargaining will often break down talks. This is because the parties will not be focused on the underlying concerns of the parties. Without uncovering interests, they will not be met.

Resolution of any high-stake dispute requires material compromises that responsible businesspersons should not be asked to make without first being presented with a rational basis for modifying risk assessments. A mediation that devolved into position bargaining through the mediator cannot support a rational dialogue; it simply plays into and amplifies the reactive cycle. A lot of energy can be expended with only the illusion of progress, while in reality resistance is steadily increasing. Position bargaining between opposing parties or from a mediator will inexorably elicit reaction, regardless of who conveys them.

After 5,600+ negotiated settlements, one thing is clear: it is easy to underestimate the degree to which perceptions of an opposing party's arguments can be distorted in an adversarial process and that therefore, one cannot reevaluate their own position without a reasoned basis to do so. Evaluative mediation offers that basis.

### **Role of Evaluative Mediation**

People often pursue negotiations on their own. Sure, it is possible to successfully reaching a resolution but while you have been busy litigating or building a business over the past few years, there are mediators who have negotiated hundreds if not thousands of settlements. Take advantage of the experience of a mediator who has walked through hundreds or thousands of resolutions of complex cases. It is not just a question of experience, but of access

to a different dynamic than is available to even the most experienced litigator.

Adversarial systems of civil adjudication are inherently and potentially reactive. Predicated on a Hegelian dialectic of thesis, antithesis, synthesis, they are designed to thresh our factual and legal issues for resolution by a third party at trial. What they are not designed to do is facilitate negotiated resolution of disputes. As an advocate within such a system, every action you initiate, even the best-intentioned gesture toward settlement, is likely to trigger an equal and opposite reaction.

To meaningfully address the manifold issues in complex actions, there must be a switch from dialectic to dialogue. It is equally essential that advocacy be maintained throughout the negotiation process, both to refine understanding of issues and risks in assessing settlement options, and to maintain litigation postures in the event that negotiations fail. Think of it as a version of scrabble, in which the end game is that all the letter tiles have to be placed on the board in such a way as to spell words that all of the players are satisfied with. Only spectacular luck will get you there without someone who has insight into all of the tiles held by all of the players.

A brief description of how that shift is accomplished in the mediation of a lawsuit illustrates how potent and pernicious the force of reactivity is, and how simply it can be redirected once it is recognized. It is unrealistic to ask responsible decision makers to compromise sufficiently to bridge such divides without a reasoned basis for reevaluating their initial positions. The process of evaluative dialogue can provide that basis.

### **Step One: Advanced Briefing.**

No one should be expected to modify strongly held views without a rational evaluation of issues. Thus, the mediator should invite the parties to submit briefs, and the mediator must put in the time necessary to fully assimilate them.

### **Step Two: Authority.**

Without the active participation of the ultimate decision makers, the process simply does not work. Require attendance with full discretion or you could be left with people who want to do a deal but don't have the authority to execute a deal.

### **Step Three: Joint Session**

The mediation will start with a joint session in which each side makes a summary presentation. The joint session serves as the predicate for rational discourse and clear communication of how each party views their position. Even where the course of litigation may lead one to conclude that positions are well understood, a joint session serves two critical functions. First, it is easy to underestimate the degree to which perceptions of an opposing party's arguments can be distorted in an adversarial process. Decades of experience have taught us that frequently the first-time key issues are clearly delineated to decision-makers is in the joint session - and without that starting point, no reasoned evaluation of risks and options can proceed. Second, parties deserve to know at the outset that the mediator has adequately prepared. Cogently summarizing presentations without misunderstanding or missing key points offers a level of reassurance that any critical risk evaluation that may follow in caucus has a sound basis.

### **Step Four: Confidential Caucus**

Critical evaluation of issues and opinions is essential. It is asking the impossible of the parties to take in critical feedback with an open mind if it is being delivered in front of their opponents. Conversely, there may be information which should be made known to the mediator that could alter risk analysis, or inform or constrain settlement options, that parties would prefer not to disclose to opponents. Finally, caucusing permits frank discussions of options without fear of compromising negotiating positions.

There are three goals in caucusing. First, information that may have pragmatic impact on risks or options can be shared with the mediator in confidence. Next, there is the opportunity to hear how the case presents to someone hearing it from the outside for the

first time, as a reflection of how it might present to a judge, arbitrator of juror. Lastly, we can begin to assess settlement options without concern for jeopardizing negotiating positions.

As caucusing progresses, it will become clear which terms of agreement might be viable. Therefore, the mediator should be in a position to advance a proposal for settlement, confident that it at least tracks the course of dialogue that has occurred between the mediator and each party. At that point, parties can be protected from bidding against themselves through the protocol of a mediator's proposal; initial responses are given in confidence, and unless all parties accept, the mediator announces only that the proposal has been rejected.

The critical and simple difference between position bargaining and an evaluative process is that rather than striving to force or cajole touching fingers across the table, the process allows each party to safely evaluate risks and options in a secure and non-reactive dialogue with a third party. When each party has touched fingertips with the mediator, they have effectively touched fingertips with each other, without having to surmount the resistance of a reactive environment by reaching across the table to do so.

The culmination of a successful mediation is a summary term sheet intended to be enforceable in the event that more formal documentation cannot subsequently be agreed upon. In that regard, if the nature of the dispute is such that complex material settlement terms should be anticipated, counsel may wish to consider exchanging drafts in advance of the mediation with blanks for terms open to negotiation.

Gaps of eight figures in stated negotiation positions on the morning of mediation have devolved to seven figures after a confidential conversation with each decision maker. This underscores the point that a mediator has access that is denied to even the most skillful advocate. The scope of that access is broad and extends to data. Regardless of how good your relationship may be with opposing counsel, there are things they cannot disclose that could yield invaluable insight into finding detours around roadblocks to settlement. Access can lead to a more balanced

evaluation of risks. On many occasions, I have heard settlement positions predicated on confidence in what a given witness would testify at trial. When I have requested and was granted permission to speak with the witness on the phone, within the confines of a confidential caucus, that conversation has often yielded a very different story than had been assumed and led to a material reevaluation of settlement positions. Delving into a substantive dialogue is the only way to unearth new data and offer new insight to unroot parties from their settlement positions. Position bargaining would do the opposite and cement parties into their positions.

Effective conflict management must reconfigure the lines of communication from the dialectic of position bargaining between parties to a dialogue between each party and the mediator. By disburdening parties of reactivity, evaluations of issues and options by experienced business leaders tends to converge. The remaining gap in positions can usually be bridged by a mediator's proposal to which each party can respond initially in confidence without compromising negotiating positions.

To summarize, the path to settlement can be arduous, but can at least be clearly demarcated; and help is available to stay on track and shoulder some of the load. First, do not invest time and defer substantive negotiations by trying to design a settlement process before establishing that the critical parties are on the same page on foundational terms. Next, accept that our civil adjudication systems are well designed for what they are intended to deliver — an adjudicated decision — but unavoidably engender a high degree of reactivity that will burden efforts to directly negotiate solutions. These dynamics usually militate for a mediation process that allows advocacy to continue its critical role, while enabling a dialogue essential to rationally and safely evaluate the manifold issues entailed in settlements.

## **Conclusion**

To conclude, forty years ago we faced up to a problem that was generating a lot of waste. We were motivated to test a theory to see if we could do a better job managing our civil disputes. And we did it. The dilemma we now face is an order of magnitude greater. That is all the more motivation to continue testing for a solution.

There was a time when we could perhaps console ourselves with the thought that conflicts elsewhere were somebody else's problem. That time has passed. Unmanaged conflicts anywhere can and do ripple into all of our lives, often catastrophically. The theory of how to manage conflict by redirecting dialectic into dialogue has been field tested and proven. We now know that we have the ability to respond to conflicts more effectively. The only question is whether we will accept the responsibility to do so.