
Kluwer Mediation Blog

A Touch of Grey

Jeffrey Krivis (First Mediation Corporation) · Thursday, January 16th, 2014

This story is for you if:

- you voted for Obama;
- you are a Grateful Dead fan;
- you want to maximize your client's settlement while addressing the party's personal concerns;
- you are looking for clear choices to balancing the importance of being client centered yet aggressive when it comes to obtaining top dollars on the case.

Litigators are constantly faced with the decision of what stylistic methods to use in settlement negotiations to maximize value for the client and achieve overall objectives. Usually a strict black and white approach to each case will miss out on the shades of grey that are needed to navigate the settlement waters. Litigators must operate in a world of uncertainty, where ambiguous communications are woven between demands and counter offers, all leading to the goal of achieving a fair outcome. The negotiation choices that are available for an advocate can be broken down into two distinct approaches, Transformative or Transactional. The references above will become clear later in this article.

The transformative advocate will always consider the needs and concerns of the client first and foremost, often putting the monetary aspects of the case in second position. The transactional advocate will primarily consider the dollars that are at stake and proceed from a competitive and aggressive horse trading philosophy. As we will see, combining the two approaches will balance the needs of the client against a fair range for the case.

This is important to think about because many lawsuits begin as a result of a "personal" value having been compromised, where money is the only way to handicap fairness. Consider a case involving a high profile entertainer who is hurt because the defendant said or wrote something objectionable in the press, or even used the entertainer's intellectual property without permission. In response, the entertainer strikes back by filing a lawsuit for various torts and publicly complaining about some moral or personal value that has been wronged that needs to be corrected. This effort is a way to get the attention of the other side in order to "transform" the mindset of those who have harmed the entertainer and to punish the person who used the defamatory language or illegally took the intellectual property.

This attempt at transformation is often met with non-monetary remedies such as an apology, press release or charitable contribution. While at first blush this might seem like an elegant solution, it does not address the monetary goals of the case. Financial remedies necessitates a "transactional"

approach where horse trading for dollars is the primary strategy for success.

When these two models converge, the transactional compromise over money tends to be the narrative of the negotiation, taking precedence over the transformative approach. Yet clients often want to know that their personal concerns have been addressed or the money may never be enough to reach a resolution. Once again, the advocate's approach is not necessarily black or white, but would be well served by a combination of transformative and transactional methods to solve the problem.

Blending the transformative and transactional models will make all the difference in the world for the client. Consider what happened to President Obama after he began to govern. According to political observer Marshall Ganz, Obama ran for office as a transformational leader, inspiring people to focus on core values of mutual responsibility, equality and diversity, such a shift would lead to dramatic change. One in office, Obama tried to govern as a transactional leader, operating within a system that requires severe compromise. This compromise was viewed by some as maintaining the status quo, as opposed to changing it. He was met with tremendous pushback and criticism. Had Obama blended his approach to incorporate his original transformative senses with the need to negotiate hard with his opponents, his effectiveness as an advocate and leader might have improved.

Now put yourself in the hot seat for a moment. The mediator walks into the room and offers a non-monetary solution for your client. That, coupled with modest settlement monies offered clearly do not give your client appropriate monetary value for the case. Do you go into Obama-the-candidate or Obama-the-president mode? The answer is that the two models are not mutually exclusive. You can acknowledge the transformational aspect of the offer and give it some value while combining a legitimate request for the mediator to ask for additional monies. By recognizing the transformational offer, you are not weakened in your efforts to seek real money for your client. The problem is that many advocates ignore this and view non-monetary offers as valueless, forcing their adversary to not fully engage in the monetary aspect of the negotiation.

Back to President Obama for a moment. Some might argue that Obama would be well served to return to the transformational model of leadership. Others are quite happy with the tremendous compromises achieved in the lame duck session of congress in 2010 and argue that Obama should stay the course. The issue for the advocate in mediation is whether to identify with one model or the other, or to be comfortable with uncertainty, and appreciate that negotiations are not just black or white. As the Grateful Dead have observed –and here is where they finally come in- “every silver lining’s got a touch of grey.”

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