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When it comes to mediation, 'yes' always means 'no'

By David B. Simpson

Atty: "What's the problem? It's a really good offer."

Client: "I know."

Atty: "It's fair, it's reasonable. You do see that, right?"

Client: "Yeah. It's just that—"

Atty: "Just what? I don't get it."

We've all been there.

Finally, you get the right offer. It's fair. It's reasonable. It makes good sense. And your client's not "crazy." They're not looking for millions on a 2-bit injury, or to escape for pennies on a case of genuine liability. They're reasonable. And they have been all along.

Yet they still can't say, "Yes" to an obviously reasonable offer.

Why is that?

While there are several possibilities, let's focus on one, the one that flows from the following psychological insight: that for a litigant to say, "Yes" to any settlement offer, they must also (internally) say, "No" not only to every other possible outcome in the case, but more importantly, to everything they feel those other possibilities emotionally signify. In other words, your client's difficulty in saying, "Yes" to that reasonable offer may have nothing at all to do with their appreciation of how reasonable that particular offer is. It may have nothing to do with the merits of that offer at all. Instead, it may simply reflect your client's difficulty in accepting the consequences of simultaneously saying, "No" to all the other possible outcomes for the case and to what your client feels that, "No" emotionally signifies to or about them.

In his masterwork, "Love's Executioner," renowned Psychotherapist Irvin Yalom framed this same powerful insight as follows: "Decision making invariably involves renunciation: for every 'yes' there must be a 'no,' each decision eliminating or killing other options."

Let's think about that in the context of settling a litigated case.

For a plaintiff to say, "Yes" to a pre-trial settlement, it may *feel* like they're also saying, "No" to things like:

- That possibility, however remote, that I might hit the jackpot and win enough money to finally and forever escape all the frustrations and disappointments of my current life. I've read about cases like that. It happens sometimes. Sure, it's a longshot. *But how many other chances like this am I going to have?* And if I settle now, even for a reasonable amount, it means saying, "No" to any possibility of ever permanently escaping this life.

- That if I go to trial, it proves I

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have "character," that I'm the kind of person willing to stand up for what I believe in. Like Rocky, I should just want to go the distance: win, lose or draw. That's who I want to be. That's how I want everyone else to see me. And if I settle now, even for a reasonable amount, it means saying, "No," to that identity. It means instead that I'm just another whiner who can be bought off.

- That so long as I don't settle, I'm an important person. People in suits in fancy offices care what I have to say and treat me like I'm somebody special. They call and write and if I even hint that maybe I'm changing my mind, they all worry and call and write even more. Trial's still way off. And if I settle now, even for a reasonable amount, it means saying, "No" to being important. It means I'm a nobody again.

For a defendant, saying, "Yes" to settlement may feel like saying, "No" to things like:

- Everyone respects a person of principle — someone who's willing to fight for what's right, regardless. Someone who doesn't just talk-the-talk, they walk-the-walk. That's who I want to be. It's how I want people to think of me. And if I settle now, even for a reasonable amount, it means saying, "No" to my principles. It means I'm just another sell-out.

- I am not a coward. I am not afraid, certainly not of a lawsuit, and I will not be pushed around, not by the plaintiff, and not by their lawyer. I'm not afraid of trial. I'm not afraid to tell my story to the jury and have them judge me. And if I settle now, even for a reasonable amount, it means I'm saying "No" to being that strong. Instead, everyone will think I was too afraid to go to trial.

Thus, in settlement, saying, "Yes" always means also saying, "No."

Granted, it's a bit Orwellian, but it is nonetheless a powerful and undeniable truth — that the reason some clients have such difficulty saying, "Yes" to a reasonable proposal has nothing to do with the proposal itself. It's a reflection instead of their difficulty saying, "No" to all those other possibilities and to what they feel those other possibilities say about the kind of person they are. Those feelings, of course, may not be rationale. Many feelings aren't. But they are legitimate. And they are real. And they frequently prevent clients from accepting reasonable settlements to which those same clients may otherwise wish they could actually say, "Yes."

As mediation counsel, how can you use this insight?

1. Well before the time when reasonable offers get exchanged, work with your client and the mediator to try to mute as many of those irrational settlement emotions as possible. This means talking frankly with your client about how they feel about litigating versus settling, and about what settlement means, or really doesn't mean, about the kind of

person they are. Start this dialogue before you ever get to mediation, then continue it with the mediator.

2. Keep in mind that if your client resists a reasonable proposal, it may have nothing to do with your client's appreciation of the reasonableness the proposal itself. That means accusing your client of having abandoned their common sense or trying to explain over and over again the reasonableness of the proposal on the table are entirely misdirected efforts, unlikely to move your client any closer to settlement. Instead, realize that your client's resistance to that settle may instead reflect an emotional struggle they're feeling about saying, "No" to all the other possible outcomes of the case and/or about accepting what they feel a settlement says about the kind of person they are. If so, that means your settlement communications will be most productive if directed at these latter, emotional issues.

3. Select a mediator who understands this insight. Select a mediator you're confident knows how to work on this issue with you and your client and (just as important) with the other counsel and their client, so that when proposals inevitably get reasonable, you don't lose a desirable settlement simply because one side or the other is unprepared to say, "No" to the emotional implications of accepting a reasonable deal.

David B. Simpson has practiced labor & employment litigation since 1982,

and has been a Mediator since 2005, where he specializes in employment, civil rights and disability/benefits mediations. His main office is in Glendale, he can be reached at www.simpsonadr.com



DAVID B. SIMPSON
Mediator