

Hidden but Present: The Impact of 'Dark Matter' in Mediation

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"Dark matter" is an invisible, mysterious substance that makes up about 27 percent of the universe. Its existence is inferred from its gravitational effects on ordinary matter, but it's not made of the same particles. While difficult to observe directly, its impact is real.

Similarly, there are usually hidden factors that impact resolutions of disputes. While lawyers focus largely on the contracts, the law and the facts, all of which are more tangible and available, we sometimes overlook the invisible forces behind the scenes.

These hidden forces can dictate the outcome in mediation. If you have ever wondered why the opposing party's position makes no sense given the observable merits of the dispute, you may be missing the dark matter. Here are some examples.

Cash flow is often a major consideration for the defending party. The defense may privately acknowledge that the merits of the case are unfavorable and that going to trial poses significant risk. However, if funds are not available to settle, the process may drag on. Large corporate defendants may await an uptick in their markets – yielding a strong revenue flow – before they are able to settle. They may also want to close their fiscal year before paying or committing to pay a large settlement. Do not underestimate the importance of year-end results and the effect they have on individual compensation and job security. In cases where large sums of cash are not currently available, the paying party should explore with the mediator whether payments can be delayed, made in installments, or come in the form of goods and services.

There are other business forces that can affect settlement efforts. For example, one of the parties may be in merger or acquisition talks that could be impacted (negatively or positively) by a large settlement. In addition, refinancing efforts or a campaign to raise capital may be under way that affects a party's motivation to settle at a particular time. Finally, similar or even related disputes with other parties could be pending. The outcome of one dispute could have a ripple effect on others. It is important to dig deeper to discover if larger business forces are in play.

Another key factor is whether the right decision-makers are at the table. The optimal decision-maker is one who 1, has authority to settle up to the highest reasonable value of the case; 2, can objectively weigh the pros and cons of settling, without ego or an emotional stake in the underlying events; and 3, has been properly educated on the contracts, law, and facts at issue. While it is easy to determine if the decision-maker is a “higher-up” executive with apparent authority, his or her limit of authority is likely unknown. It can be equally difficult to know whether the other criteria are met. A good practice is to ask your mediator to inquire with the opposing attorneys and, where necessary, to request a direct discussion between the mediator and the decision-maker to confirm 1-3 above.

A fourth factor is the ongoing business relationship between the parties. Disputes are generally harder to settle if the parties never want to see each other again. Conversely, if they need each other to conduct their business, finding a path to settlement is considerably easier. In these situations, both parties can justify a less-satisfactory result to preserve future opportunities. If the relationship can be expanded, or if an immediate nonmonetary business benefit can be conferred, the need for money changing hands now is diminished. Legal marketing professionals often tell lawyers to “learn your client’s business.” In mediation, you should also learn the opponent’s business to improve the odds of resolution.

Finally, “timing” is a theme that runs through the factors above and other dark matter considerations. Is the project done and is the damage now calculable? Have the decision-makers had time to be properly educated? Is it impossible to settle until a third party gets involved or until an event occurs that offers an opportunity to strike a deal? Is trial imminent? Perhaps most importantly, have the parties felt the pain – or do they otherwise appreciate – the time commitment of litigation and the weight of monthly legal bills?

Experienced attorneys and mediators can often predict or manage these timing factors to mitigate the legal expense and waiting time otherwise necessary to settle a case. They can also ensure that you consider both the visible and invisible factors that will facilitate resolution and allow the parties to move on with their lives.

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