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"Is Your Adversary Really Mediating in Bad Faith?"

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"We think the other side is negotiating in bad faith."

Mediators hear statements like this all the time, often from both sides in the same case. And yet, parties settle difficult cases every day, warmly shaking hands with the very people they accused of "bad faith" negotiation just hours before. What is going on?

In my experience, "bad faith" is more of a mediation trope than a negotiation reality. After some questioning, the mediator typically learns that the party making the accusation does not mean it literally. The party rarely believes, for example, that its adversary lacks a genuine interest in settlement or is mediating for some impermissible, strategic purpose, such as delay or obtaining "free discovery." In fact, most parties who come to mediation (even pursuant to a court order) genuinely want to settle. But they want to do so on their own terms.

When a party makes an accusation of "bad faith," it is usually protesting the reasonableness of the other side's settlement proposals. "Bad faith" is, in effect, a rhetorically charged way of saying that the other side is demanding too much, offering too little, or refusing to move far enough from where it started during the negotiation. The accusation can be prompted by a perception of unequal movement: when one party makes what it regards as a big move and its adversary does not reciprocate, the mediator will likely hear that the adversary is negotiating in "bad faith." In voluntary mediations, this charge often reflects a mismatch between parties' expectations after agreeing to mediate, and the

actual proposals exchanged at the mediation. When a party receives a proposal that it regards as unreasonable, it will question why the other side agreed to mediate in the first place. "Bad faith" is a seemingly irresistible explanation. But even here, "bad faith" usually does not mean an impermissible purpose or a lack of genuine interest in settlement. It

means a settlement proposal regarded as so unreasonable as to be a waste of everyone's time.

A party may make a seemingly unreasonable settlement proposal for many reasons, and "bad faith" is usually not one of them. Such a proposal may reflect an opening negotiation style (hard or positional bargaining) that ultimately may soften. It may be designed to send a message that the other party has not moved far enough to merit a "reasonable" response. Or, it may be a sign that the parties have fundamentally different views about the merits of the case and fair settlement value. What one side regards as a proposal so unreasonable as to signify "bad faith" is quite often, from the other side's perspective, a reasonable proposal reflecting a sincere willingness to compromise. These are all real, but potentially solvable, negotiation problems. But when a party attributes these familiar negotiation roadblocks to its adversary's sinister motives, it is usually misdiagnosing the problem.

A charge of "bad faith" may also be counterproductive because it can set up additional roadblocks to settlement, and exacerbate the bitter feelings and lack of trust that are routine by-products of litigation. A party fixated on the other side's purported bad faith is often unable to approach the negotiation dispassionately, let alone make the compromises necessary to achieve resolution. "Bad faith" is the kind of accusation that, even if made privately to the mediator and intended rhetorically, tends to harden parties' positions and prevent creative problem-solving.

When negotiations get tough and you are not getting what you want or expect from the other side, it may seem like your adversary *must be* motivated by bad faith. However, bad faith in mediation is rare. And when parties believe it is affecting the mediation, they tend to get distracted from the actual negotiation problem at hand. Rather than reflexively attributing unreasonable settlement proposals to "bad faith," try to identify other, more likely, causes – such as hard bargaining, dissatisfaction with your own proposals, differing case evaluations, or lack of information. These are likely the real impediments to settlement that the mediator can help the parties work through, and hopefully resolve, during the mediation process.

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