

The Art of the Bluff... Risks of Trump-style Negotiation in Lawsuit Settlements

By Carmine Cornelio

The New York Times recently published an article about President Trump's negotiating style and how, while it sometimes works in business deals, it had more risk of failure if used in other areas.

Trump's theory of negotiating typically involves making an aggressively low- (or high-) ball offer, which then creates an "anchoring effect" and leads to a "Win" of the best deal. In my experience, trying to "Win" the best deal in negotiating settlements of lawsuits by conveying settlement demands/offers that are more often than not entirely unrealistic doom the negotiations to failure.

Outlandish starting points (in lawsuit settlement talks) do not shift the frame of reference for the haggling that then follows. As the Times' article notes (citing the Harvard Professor who was the author of Negotiating the Impossible), this style more often creates a significant risk of shutting down any hope of good faith negotiations.

The *Times* story also cites Columbia Business Schools' Professor Ames, who noted that an overly brash opening bid does not lead to capitulation from the other side. Instead, it more often leads to either a complete shutdown of negotiations or a response that is just as brash.

Settling lawsuits is fundamentally different than buying/selling cars or real estate. In commercial transactions, the framework is set in the context of a willing buyer and seller. Lawsuits are not set in the same context because neither party truly wanted to be in a lawsuit. Neither party can simply decide not to buy or sell. The "market value" is harder to assess. Of greater import, each side has significant distrust and anger that must be considered.

For this reason, there is real merit to the old saying that a settlement of a lawsuit happens when "no one is happy". Getting to that flex point of a "reasonable" settlement amount takes skill, foresight, experience and realistic assessments. Parties do not have to "negotiate against themselves" by being overly soft in settlement positions in order to reach a settlement. They do, however, have to avoid the Trump style of bluffing with offending positions.

Keep in mind that settling lawsuits are not like negotiating a business deal. The emotional aspects that are ever present in lawsuits create too significant a risk of failure when bidding hands are overplayed. Whatever your views are on President Trump, great caution should be taken before you decide to try and bluff your way into a great settlement with unrealistic offers or demands. At a minimum, reviewing your negotiating strategy (and reasoning for establishing demands/offers) with your client with these thoughts in mind may be useful.