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# Principle, curiosity and the ground beneath a mediation

Effective mediation requires parties and counsel to balance principle with practical awareness, shifting between abstract conviction and grounded analysis to reach better, more strategic settlements.

By Greg Derin

**T**hales of Miletus is regarded by many as the first Western philosopher. In the *Theaetetus*, Plato relates the tale of how Thales was once so absorbed gazing upward at the heavens, so fixated on the order of the cosmos, that he did not see a well in his path and consequently fell into the well. A nearby servant is said to have laughed at the philosopher who could not see what lay beneath his own feet.

The story, repeated throughout the ages, has often been cited only as a lesson that we should watch where we are going. But the tale of Thales also reflects a deeper human tension.

It is easy to see Thales simply as an absent-minded thinker whose devotion to abstraction became destructive. But his tale is far more complex. Thales refused to live only at the level of the obvious; he was also searching for meaning, ever curious and looking beyond appearances toward something larger.

Thales is best remembered for his extraordinary contributions in mathematics, astronomy, engineering and philosophy. At the well, his curiosity would not have been an obstacle to success if he had remembered to keep one eye open. The tale of the well is thus, at its core, about the foundation of Thales' success: curiosity.



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## Thales I and II

As a mediator and arbitrator of commercial and intellectual property disputes, I am accustomed to participants providing lengthy, complex briefs, voluminous exhibits, deposition transcripts and expert analyses. The disputes I encounter may present themselves pre-litigation or on the verge of trial, but all involve complex stories and emotions. In that environment, I frequently see con-

temporary incarnations of both versions of Thales — parties consumed by principle, grievance, and narratives requiring vindication (Thales I), and parties who are curious, open-minded and wondering about possibilities (Thales II). The parties rarely notice their own mindsets, but a mediator does, and resolution can depend on helping them fix their gazes on the right constellation without falling into the well.

## Thales I

What happens when a litigant is fixed so tightly on principle, grievance, identity or vindication that the person fails to notice the approaching well? Good mediators will help this Thales I shift his or her gaze from the skies to what is closer to the ground. The mediator might help Thales I recognize the cost of litigation and its delays, the erosion of business relationships, the uncertainty of outcomes, the burden on a family, the distraction from work and how the dispute can consume the life around it.

Even when professing to operate on “principle,” Thales I might be so intent on pursuing a result that he or she ignores the time, expense, fatigue or the relational damage which attends prolonged conflict; this person may mistake illusory consistency for wisdom and endurance for strength. By the time Thales I looks down and sees the approaching well, it is too late.

By asking the right questions, the mediator can facilitate a conversation that shifts Thales I from an emotional mindset to a slower, more objective and analytical assessment of the matter and a deeper understanding of best interests and goals. As Daniel Kahneman described in *Thinking, Fast and Slow*, the mediator helps move Thales I from System 1 to System 2 thinking — from fast, intuitive and emotional decision-making to slower, more deliberative and logical analysis.

## Thales II

Thales II might do the opposite. This litigant could end up staring only at the ground, nervously apprehending disaster. For Thales II, the main goal is closure, creating the potential to miss significant opportunities for gain or “less expensive” settlement. In the interest of expediency Thales II might forgo reflection and settle by opting for a conventional distributive bargain — exchanging money, comfortably reaching a compromise — without learning anything.

In doing this, Thales II might miss the prospect of tradeoffs, joint ventures, mutual gain or an economically less “expensive” resolution using a different currency. Thales II already operates within System 2, but he or she may lack the skill to see the bigger picture, the vista whose options allow for “expanding the pie” to encompass more potential win-win scenarios.

### Mediation strategy

Strategic mediation creates complicated expectations. It asks parties to hold the heavens and the ground in the same field of vision. One cannot settle thoughtfully when blind to principle; principle gives a dispute meaning. But one also cannot settle sensibly if one mistakes principle for meaning.

Not every moral conviction requires an all-or-nothing outcome. Not every injury requires the same remedy. Not every position that feels

righteous is strategically wise. The mediator’s task is to help the parties acknowledge their motivations, while also recognizing what is truly at stake. An outcome that might be satisfying in the abstract can also be damaging in practice.

Thales’ tale is a reminder that curiosity is a virtue. The willingness to ask deep questions distinguishes a mature negotiator from a merely tactical one. A party who asks, “What do I really need and why do I need it?” is better able to move toward settlement than is a party who, without thought to the benefit of their desired result, simply repeats the mantra, “What I want is justice or revenge.”

Experienced mediators are capable of doing two things at once: honoring the emotional and moral content of the dispute and insisting that the parties answer practical questions. Why do you want what you are requesting? How does that outcome help you? How did you arrive at, or what is the basis for, your proposal? What is your actual exposure? What are the alternatives? What are the costs and risks of continuing? What will it mean to revisit this in six months, or six years?

### Position to possibility

Thales reminds us about an important discipline. Advocacy in mediation is not simply the art of prosecuting a case; it also involves helping a client pursue their ulti-

mate goals. A client may become attached to a narrative of endurance that has become unjustifiable and expensive. The lawyer’s role is not to extinguish conviction but to place it in context, to ask whether the client’s story still serves an actual interest. The objective is to distinguish between a position that is emotionally satisfying and one that is strategically sustainable.

Mediation is a structured attempt to help people move from position to possibility. Thales reminds us that wisdom without attention can become folly, but attention without wisdom can be myopic. An objective of mediation is to keep both in view. Pre-mediation conferences with counsel can help in identifying potholes and focusing parties and counsel on broader vistas.

Many paths and techniques can help parties move toward resolution. Identifying those that are uniquely suited for a particular controversy requires both an understanding eye and the ability to relate to the parties’ needs. Wise counsel will select the mediator best suited to the issues, personalities and obstacles posed by their particular dispute.

### Conclusion

The most successful parties in any mediation are not those who abandon principle, but those who learn to pursue it without being blinded. They understand when it is appropriate to gaze upward and when they should look down. They recog-

nize that the goal is not simply to be right, but to achieve a resolution — in whatever forum (court or conference room) that preserves resources, dignity, and future capacity.

This is mature judgment. The most rewarding mediation is designed to maximize the exercise of the parties’ judgment and self-determination while allowing them to see possibility — while avoiding falling into the well.

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