Considerations in Making Opening Demands at Mediation

By Brian McDonald

Background

By the time a mediation has been set, you have usually had an opportunity to "size up" the other side and its representatives. By way of deposition and other discovery, you have identified and narrowed the issues. The mediator selection process has been completed, and it is time for you to file your mediation brief'.

Assuming there has been no negotiation on financial matters or exchange of settlement figures, who makes the first proposal? Should you? If you do, some advance planning is necessary. Do you intend to start at a reasonable level? Then your ability to make concessions will be limited. What are the expectations of the other side? If you intend to make a more aggressive initial demand, then you will have more room to make concessions. If you put the first number out, what is your plan in *this* case for realizing the settlement you want?

Keep in mind the rule, "Never say never, and never say always." The circumstances *of each* case will dictate what tactic to use. The person negotiating for the other side is of primary importance.

Who Should Put Out the First Number?

Normally, the plaintiff is expected to open settlement negotiations. However, this is not an iron-clad rule. Some writers suggest it is a bad idea for a plaintiff to make the first demand, arguing that you risk giving control over the negotiation process to the other side. These writers believe that because the defense needs to justify their expenditures on each case, and a demand is what is used to do that, if the plaintiff holds back, sooner or later the defense will beg for a demand and will often resort to making an offer. It is felt that if you can get the other side to commit first, you then discover the range in which the other side will settle the case and their basis for their offer or demand to settle. Will you get an advantage by having the other side commit first? Query: your case has a $500,000 value, you delay and get the defense to offer $625,000 to settle, have you gained anything? If their initial offer is too extreme, do you have any incentive to bargain? Vice versa, if your opening demand is too extreme, does the defense have incentive to bargain?

Sooner or later, someone will eventually have to be the first to declare, and sooner or later in the great majority of' cases someone will make a reasonable proposal. The number you propose at *each* stage should be justifiable and your scenario planned.

When there are complex issues in a case, sometimes they can be addressed in an opening mediation brief without setting forth your settlement number. Alternatively, if your case includes a subject with which you are not familiar, you may fear your demand will not be high enough and thereby leave "money on the table." You may feel the other side may be ready to pay even more than your initial demand, but as a result of your low demand the other side will reduce their position to get a relatively inexpensive settlement. In cases where you do not know the value, it makes sense not to open. Rather, sit back and wait for an offer from the other side, either directly or through mediation.

On the other hand, if you are confident in your ability to accurately evaluate the range of your case (whether from Jury Verdicts or verdicts and settlements personally obtained in similar matters), and you can be fairly certain the other side is familiar with the same issues and standards, the psychological benefits from making the first offer should be considered by you in each case.

Benefits from Making the First Demand

Significant research through Professor Howard Raifa of Harvard University indicates that the first number proposed that is not absurdly high (from a defendant's standpoint) or absurdly low (from a plaintiff's standpoint), will set the zone of bargaining, and the final number will usually fall mid-way between the two extremes. This is sometimes referred to as "reasonable zone of acceptance". Of course, a plaintiff's first number should be at the higher range of the zone, and the defendant's first nurnber should be at lower range. Many feel it is to your advantage to establish a reasonable range at the outset because of a principle known as "anchor and adjustment". Putting forth a high number within the zone of acceptance in the initial demand sets the anchor from which the other side unconsciously starts to deal. Beware, an opening number totally outside the zone of acceptance (one that can-not be objectively justified) will not generate the "anchor and adjustment" reaction from the other side that you want, and will usually be counter-productive.

Assume you let the other side open and there is a relatively low number on the table. You, in response, propose a some-what higher settlement number than you would normally offer, *however*, your number is supportable by

reasonable evaluation standards. A dynamic known as the "norm of reciprocity" can come into play. If you and I are bargaining in good faith and you make a concession to me, I feel compelled psychologically to respond accordingly and make a concession to you. So, after your demand is countered, and you further counter with a more reasonable demand, I am induced to say "yes" or at least feel a need to make a more reasonable response.

Charting Your Concessions

Each party at a mediation wants to feel not only that they settled, but they got a deal, in fact a "good deal." To secure a "good deal," both sides *need* to negotiate. If you do not build in room for your opponent to negotiate and feel good about the deal, success may be more elusive. As an example of this concept, if your case deserves a settlement of $50,000, and you make a demand to settle for $75,000 (which $75,000 you can arguably support by verdicts or settlements in other cases), then an ultimate $50,000 settlement may seem reasonable to the other side. If, however, your initial demand is $55,000, and you move down S5,000 with the intent to settle at $50,000, it is not as likely that the other side will feel they got a bargain in this case. By making the initial demand higher ($75,000), the other side will feel some relief and satisfaction as the settlement reaches the $50,000 range.

You should also consider that part of a successful mediation is framing your concessions in a way which tells the other side they have made a good point, or they have a good argument, and as a result of their point or argument, you have adjusted your expectations and lowered your demand. This type of good faith negotiation generates good will, and good will more often that not generates good settlements.

In negotiations involving money, "haggling" over the amount is the rule, not the exception. It is a competitive situation. The parties, the adjusters and the lawyers involved are competitive. You should look down the road, consider what your later demands will be, and plan step-by-step concessions.

Some negotiators want to open at the highest number justifiable, hold for some significant period of time, all the while indicating a willingness to bargain, and then make a series of progressively smaller concessions as they close in on their target amount. Many traditional negotiators mentally track and map the negotiation exchanges in an attempt to determine your tactic. In response, they carefully and purposefully make smaller concessions, thereby hoping to send a signal they are getting close to the point when they are going to say no. Remember, this is simply a tactic. Be aware of it.

Many negotiators in mediation believe it is important not to make big moves early in a high-stakes negotiation. Why? The theory is that large moves early in negotiations confuse the other side. If they are traditional negotiators, the message they hear from big moves is that you are anxious to settle the case. Further they believe the issues or the money conceded must not have been that important to you, because they did not have to fight very hard to win the concession. This concept, labeled "concession devaluation," holds that what we obtain too easily, we do not value very highly. This is another reason to consider keeping your initial demand within the zone of acceptance and not make large early reductions.

Consider Your Style and the Style of the Other Side

Recent studies indicate that if you adopt cooperation as your strategy in mediation negotiation, more likely than not you can achieve ultimate gains for all parties. When your opponents also choose a cooperative spirit, you both will be on the road to a reasonable settlement. However, if the other side does not see things in your "cooperative way," a more competitive atmosphere and what some may perceive as hostility will develop more often than not.

Once competition develops, traditional mediation advocates may utilize a process called "tit for tat." This theory suggests as follows:

I. Begin cooperatively in your negotiation;
2. Retaliate if the other side is competitive;
3. Concede when the other side becomes more cooperative.

However, recent studies conducted at Stanford University suggest a slightly different approach may be more effective:

1. Be cooperative;
2. Remain cooperative unless you are behind ("neither an exploiter nor a sucker be");

While considering these concepts, and considering if you will make the first "credible" offer, also keep in mind the "winner's curse." For an example, you walk into an upscale department store and see an expensive leather coat that you can see yourself wearing to social events, but when you see the price tag of $900, your dream ends. You do not want to pay this price for a coat for social occasions. Two weeks later you are in Spain and see in a small leather shop a coat that, to your eye, is exactly the one in the department store, but there is no label and no price. You consider it, come to a decision, and walk up to the clerk and say, "I will give you $350 for the leather coat." The clerk says, "Sold." You pay for it, and as you are walking away you wonder if you could have bought it for $300. A few minutes later you become concerned that you could have bought it for $250. You are now upset and have forgotten that you have the same coat as the $900 coat in the expensive department store.

In mediation negotiations if a plaintiff demands $250,000 to settle, and the defendant says, "I accept!," the winner's curse will take over. But if the plaintiff demands $500,000, and the defendant offers $25,000, the substantial disparity between the demand and offer relieves the parties from the "winner's curse" potential. Now, further negotiations can take place.
Assume the further negotiations follow this scenario:
Plaintiff demands $500,000;
Defendant offers $25,000;
Plaintiff counters with $485,000;
Defendant counters with $40,000;
Plaintiff counters with $470,000;
Defendant counters with $55,000.

Many feel this is the typical court settlement conference scenario. Parties in mediation feel and verbalize that with this process they are wasting time. It is also known as bracketing (the demand and offer when added up and divided by two still yield the same amount). Experience indicates that whoever makes the first credible move can control the pace and style of further negotiations, secure a better result, and still benefit from the aura of being cooperative.
Consider the following scenario: Plaintiff demands $500,000;
Defendant offers $25,000;
Plaintiff counters with $475,000;
Defendant (who wants to settle between $125,000 to $ 150,000) makes the first "credible" move and offers $75,000 (leaving some further negotiation room);
Plaintiff, encouraged by this move, counters to $400,000;
Defendant Counters with $100,000,
Plaintiff counters at $375,000;
Defendant Counters with $115,000 (cutting down the gap from defendant's prior counter-offer to indicate defendant is getting close to his target amount).
At this phase, a mediator may suggest a dramatic concession by plaintiff; for example, to $225,000.

A mediator can be used to affect the flow of the above negotiations. Faced with an initial defense offer of $5,000, the plaintiff may authorize the mediator to tell the other side that they had intended to submit their initial demand unjustifiably high at S500,000 because they felt the $5,000 offer was unjustifiably low. In the spirit of cooperation and in good faith, the plaintiff will demand $350,000, however, emphasizing through the mediator that this is not an invitation to bid for a "tit for tat" negotiation. Rather, this "credible offer" is being made to encourage the defendant to come up to a reasonable range. If this is your tactic, be sure the mediator “carries the message” correctly to avoid "concession devaluation” as discussed above.

Impasse

If you adopt a cooperative approach, but the opposition is truly competitive and still refuses to cooperate, how do you respond'? *You cannot rush the process.* In the first caucus, you need to resist the impulse to "cut to the chase." Timing is everything. You simply will not get top dollar early in the mediation with a competitive negotiator on the other side. The other side wants the mediator to understand their position on value, and work to help them get it. You feel the same and must be ready to actively participate in open-minded communication. This assumes you have carefully planned where you wish to end up and how you will get there. You should have an idea of the concessions you will make, the timing of each, and whether you are operating in a cooperative mode or competitive mode. Do not lose the other side's attention by making a demand which can be seen as unreasonable or even outrageous. Further, consider using the mediator to probe the other side.

Summary

Whether first offer or first reasonable offer, anchor and adjustment, norm or reciprocity, concession devaluation, tit-for-tat, or the winner's curse - knowing where you wish to start and what tactics you wish to use in each case will help you construct a "horse trade" that will be preferable to the other side rather than no agreement at all. Your further challenge is to dovetail this into joint gains and thereby generate goodwill now and in the future.