Sending Messages With Numbers At Mediation

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Background

It is time for you to file your mediation brief. Assume there have been no negotiations on financial matters or exchange of settlement figures. Who makes the first proposal? Should you?

- Do you intend to start at a reasonable level? (If so, your ability to make concessions will be limited. What are the expectations of the other side?)
- Do you intend to make a more aggressive initial demand? (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?

"Never say never, and never say always." The circumstances of **each** case (including the person negotiating for the other side) should dictate what tactics you use.

Who puts out the first number?

Normally, the plaintiff is expected to open settlement negotiations. However, this is not an iron-clad rule. Some writers suggest that if the plaintiff holds back, sooner or later the defense will beg for a demand and will often resort to making an offer because the defense needs to justify their expenditures on each case, and a demand is what is used to do that. Quere: your case has a $500,000 value, you delay and get the defense to offer you $25,000 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.

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 according to your planned scenario.[1] If you are confident in your ability to evaluate the range of your case (whether from Jury Verdicts or verdicts and settlements personally obtained by you in similar matters), the psychological benefits from making a first offer should be considered by you in each case.

[1] If your case includes a subject with which you are not familiar, you may fear your demand will not be high enough and therefore leave "money on the table." Sit back and wait for an offer from the other side, either directly or through mediation.

Benefits from Making the First Demand

Keep in mind that significant research through Professor Howard Raifa of Harvard 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.

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

A plaintiff's first number should be at the higher range of the zone and the defendant's first number should be at the 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 cannot be objectively justified) will not generally get an "anchor and adjustment" reaction from the other side and will often be counter productive.

Charting Your Concession

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. Another fear is if you negotiate too fast or too far, you will fail to get any surplus value available.

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 lowest justifiable number, 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 into 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 purposely 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.

Assume one round of negotiations has taken place and there is a relatively low number offered by the defense. You, in response, propose a high settlement number, 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 in good faith bargaining 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.

Consider Your Style and the Style of the Other Side

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

1. 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").

Example:

Assume the negotiation follows 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 a 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 may control the pace and style of further negotiations, secure a better result, and still benefit from the aura of being cooperative.

Send a Message with Your Concession

You should consider that part of a successful mediation is framing your concession 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 demands. This type of good faith negotiation generates good will and good will more often than not generates good settlements.

A mediator can be used to affect the flow. Faced with an initial defense offer that is minimal, a plaintiff may authorize the mediator to tell the other side that the plaintiff had intended to make their initial demand unjustifiably high 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. Principled negotiation! This assumes you have carefully planned where you wish to end up and how you get there. You should have an idea of the concession 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.

Bargaining and negotiation moves should be made in relationship to the value of your case, not necessarily in relationship to the other side's offers or moves. If after a lengthy mediation your last demand is $700,000 and the defense last offer is $75,000, if your client is willing to settle a case for $450,000 and be happy with that, why not make that demand? You did not make a large move early to avoid "concession devaluation," however, at this point a new, lower offer puts pressure on the other side, especially if it is at the top of the range where the defense wants to settle. Some may argue, "If I go low and they don't come up, then this lower number will be my ceiling next time we negotiate." Why? There is no rule that you can be forced to take an amount three months from now simply because you made the offer previously. Passage of time, increase cost and increase expenditure of your effort can alone be changes in circumstances. Why not come to your bottom line demand at the end of the mediation session and see if the defendants will come to it?

Summary

Cleverly crafting where you wish to start, and what tactics you wish to use in each case, should help you construct a "horse trade" that will be preferable to no agreement. Your further challenge is to dove-tail this into joint gains and thereby goodwill now and in the future, keeping in mind the tactics of first offer, first reasonable offer, anchor and adjustment, norm of reciprocity, concession devaluation, and tit-for-tat!

When you leave the mediation, you want to know that the possibilities for negotiative settlement have been thoroughly explored and exhausted.

Hypothetical For "Sending Messages with Numbers at Mediation"
August 1, 2002 by Brian McDonald, Mediator

Plaintiff, while driving on the freeway, slowed for traffic and almost to a stop when he was rear-ended by a truck towing a trailer. The impact was 40 mph. Plaintiff, '70 years old, had a discectomy at C6 and C7. There are minimal residual damages, medical expenses are $75,000.

The value of the case for the purposes of this hypothetical is $400,000. (It's OK if you think it should be higher or lower - don't fight the facts - the value is stipulated to be $400,000 and your client would be ecstatic if you settled the case for $400,000.)

You are going to go to a mediation in two weeks, and you are submitting your brief today. There have not been any prior financial negotiations. -

What is your opening (a. first demand) in your brief?
Why this number?

Assume that the first offer from the defense is $50,000. What is your reply (b. second demand) to defendant's offer?
Why this number?

Assume the defendant's second offer is increased by the difference between your (a) first demand and your (b) second demand. What is your reply (c) third demand?
Why this number?

When do you anticipate making a major shift close to your $400,000 valuation?
Why then?