

Why You Should Avoid Putting A Dollar Demand/Offer in Your Written Mediation Summary

By

Sheldon J. Stark
Mediator and Arbitrator
2531 Jackson Ave., #102
Ann Arbor, MI 48103
www.starkmediator.com
734-417-0287

Advocates for parties in mediation often set forth a specific dollar demand or counter-offer in the written mediation summaries they exchange with the other side. In my experience, with some exceptions, the reaction is often consternation or worse. I recommend against it. Here's why:

1. When a number is included in the summary, it is either the first demand/offer of the case, or the first demand/offer of the mediation process. Either way, it's generally intended as a *start* to the negotiation, not an end. No one seriously expects acceptance of their first offer. Experienced advocates know that. Their clients may not. Opening numbers sometimes give a party the wrong idea about the value of their case. With little experience resolving civil litigation, they are unfamiliar with how the process works. Their only experience has been limited to negotiating the sale of a home or purchasing a car. They have learned to expect that the sale price will be fairly close to the asking price. Civil litigation negotiations are not like that. Although competent and responsible advocates cover this in preparation for the process, seeing that number in writing often causes unrealistic – and therefore, unproductive – expectations by decision makers. Unrealistic expectations easily torpedo a successful outcome.

2. Opening numbers leave advocates room to move once the exchange of proposals begins. Every litigator gets that. Their thinking, however, often fails to account for how the other side will react. If the number bears no relation to reality or any actual damages sustained, the response can be severe and unpleasant. Unrealistic numbers cause consternation, frustration, and resentment in the other team. It causes the recipient to lose confidence a deal can be reached. The mediation hasn't even started, and one side is already aggravated and unhappy. Parties and lawyers alike read numbers as signals. Loud signals. An unrealistic number can send the message that the other side is not in the same city, yet alone the same ballpark. "Why would I want to negotiate with them?" they ask. "We came to mediation to settle, not give the store away!" Preliminary irritation can drive the whole process sideways long before we've gotten truly started. It is entirely foreseeable that the number will be viewed as insulting or a sign negotiations are going nowhere. I've seen parties threaten to terminate the process before the day of mediation arrives. Mostly they don't; mostly they stay. If they stay, however, we may spend extensive time getting back to square one to calm down for a reset.

3. Demands/offers are sometimes developed without reference to prior negotiation history. In such cases, the demand/offer may look like it's moving in the wrong direction. Lawyers resist negotiating backward, even if time has passed or conditions have changed since the first offer was made. For example, plaintiff's summary reads: "For all of the foregoing reasons, Plaintiff will demand \$250,000 at the time of mediation." If, only months earlier, counsel submitted a demand for \$100,000, the reaction is outrage. \$250,000 sends a terrible – but sometimes unintended - message. Defendants and their counsel arrive at the table troubled or outraged. They often choose to move backwards themselves or open with less than originally intended – to send a strong signal back. Does it reduce the chances of success? Yes. But, who wants to negotiate with someone moving farther away when success requires moving closer?

4. A settlement demand/offer, even in an early round, should be the product of careful thought, analysis and consideration. Thoughtful or strategic opening demands/offers require an evaluation of loss and damage, pumped up by a rational cushion to allow room to move toward the "sweet spot" of resolution. A good opening number should be accompanied by a rationale, related in some fashion to reality and risk, even if an alternative reality or a different assessment of risk. A prudent advocate in mediation participates in the process to listen, recognizing the value of mediation as a vehicle for the transfer of crucial information should the dispute not settle. Mediation will often reveal new facts or fresh insight into previously unseen or under-valued risks. Recalibration from fresh insight and analysis or new facts will have a constructive impact when opening numbers are communicated. A strategic negotiator should consider delaying a formal demand/offer until hearing from the other side or meeting with the mediator. Delay creates an opportunity for the parties to consider developing more credible opening proposals. Lawyers are competitive. Unrealistic numbers attract unrealistic counter-numbers. Credible opening proposals often stimulate credible – and sometimes reciprocal - replies. Informed proposals enhance attorney credibility and lay the foundation for productive exchanges leading to mutually acceptable resolutions.

Accordingly, I recommend not making a specific dollar offer or counter-offer in your written mediation summary. Have a number prepared, of course. But bring an open mind to the table and be prepared to learn and adjust. And, of course, make certain you have an accurate understanding of the last numbers communicated!

Caution: If you have a claim for damages, medical bills, lost wages, lost profits, etc., by all means, detail your calculations, assumptions and rationale in writing with appropriate backup material. This is crucial information the other side will need to understand your perspective, conduct its own analysis and obtain settlement authority before *they* reach the mediation table. Good practice dictates sharing your damage model; but keeping your demand/offer under wraps until later. In lieu of a demand/offer, I recommend a statement at the end of the summary along the following lines: "At the time of mediation, [plaintiff/defendant] will seek a resolution consistent with the facts, evidence and risk."