WHAT PARTIES SHOULD KNOW ABOUT NEGOTIATIONS AT MEDIATION

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INTRODUCTION

For many, especially those new to the process of settling legal disputes, negotiations across the mediation table are like nothing the parties have ever experienced before. The purpose of this article is to better prepare participants in mediation for what to expect and to suggest ways they might take full advantage of their participation in the process.

ANTICIPATE A TROUBLESOME START

Lacking prior experience, many parties arrive at the mediation table only to find themselves shocked, disheartened and frustrated when the opening settlement offer from the other side is received. As every mediator knows, whether hyper-inflated or low ball, opening offers can result in outrage, pessimism, discouragement, consternation, threats to bring the process to a crashing halt, or all the above.

Emotional reactions to hard ball openings do not necessarily mean the mediation is over. Mediators can move the process forward and get past such hurdles by listening to participants vent, bringing calm into the room, and encouraging consideration of a longer perspective. What is that longer perspective? (1) The first settlement offer is merely an opening figure; not the last. (2) Mediation is frequently an all-day process; the first proposal is only a start. (3) No one actually expects the first offer to be accepted, certainly not the offeror. (4) Opening offers are rarely a true reflection of what a party is willing to offer or accept. And (5) the other side's top or bottom line – which does predict whether settlement is possible - is unlikely to become evident until several offers and counteroffers back and forth throughout the day. If parties knew what to expect in advance, perhaps this time consuming and emotionally challenging effort wouldn't be needed.

Inevitably, unrealistic opening proposals lead to equally unproductive, unrealistic and reactionary counter proposals which in turn cause outrage and dismay back in the room where it started. Sometimes it helps to point out that they've just received the mirror image of their own unrealistic opening offer, or that the other side matched an unproductive number with its own unproductive number to create "book ends". But such reminders are not always heard or processed. Even for parties with experience negotiating legal disputes, opening rounds in the negotiation process can be disturbing and painful. Hardball tactics designed to achieve an advantage – especially when unexpected – generally result in the opposite of what was intended. Instead of sending a message about the true value of a claim or the appropriate ballpark, hard ball unproductive numbers prolong the negotiation process, increase costs, impair businesslike thinking, cloud judgment, and reduce the chances of reaching resolution.

HARDBALL TACTICS ARE NOT UNCOMMON

Once past the challenge of frustrating opening proposals, the negotiations may continue at a glacial pace for several more rounds. Competitive and incremental, barely noticeable movement can be maddening. For many advocates and their clients, the negotiation "dance" itself becomes the source of grievance. There are many reasons even experienced negotiators do this, including:

- Some negotiators were trained to negotiate aggressively with hardball proposals to start.
- Some believe an aggressive, negative opening offer sends the right opening message: "Don't get your hopes up."
- Some seek to establish a favorable negotiation range before the other side can do so.

- Some believe in the power of anchoring, i.e., that the final number in a negotiation is generally closer to the first offer than the first counteroffer.
- Some believe an unproductive number can help lower the other side's expectations about the value of the dispute.
- Some actually believe that discouraging the other side early is an important step in the softening up process.

Whatever the motivation, aggressive, hardball proposals reduce the other recipient's ability to exercise good judgment. No matter what message or encouragement accompanies an offer, the number itself is such a loud message it tends to drown out all other signals. Unproductive early numbers confirm a party's worst fears, crank up their emotions, foul their mood and darken their vision of where things are headed. Good will generated as the parties prepare for mediation is dissipated

In my experience, when parties know what to expect, arrive at the mediation with a realistic perspective and a robust understanding of the process they will be better able to exercise patience, take hard ball tactics in stride, limit the power of emotions to cloud their judgment, and make good decisions about whether to settle and on what terms.

IMPATIENCE IS NOT YOUR FRIEND – THE OTHER SIDE IS COUNTING ON IT

Parties should *not* be discouraged by unrealistic, unproductive opening numbers. Proposals offered or demanded in Round One rarely predict where a dispute may settle. Parties get the most out of mediation when they listen, maintain an open mind and place trust in the process to achieve their goals and objectives. Good settlements require patience. Mediations are scheduled for the entire day for a reason. There may be as many as five, six, or seven rounds back and forth before the process is complete. Some disputes require a second day. In addition, there are structural reasons for optimism:

- *The process is generally voluntary*. People put their money where their mouth is. Rarely is someone willing to invest in a mediation process if they have no intention of settling. When mediation is court ordered or encouraged by the judge, most participants willingly engage nonetheless to take full advantage of the unique opportunity mediation offers to participate in a conflict resolution process.
- *Decision-makers are seated at the table*. Who is in the room for the other side? Have they sent a low-level place holder simply to make a show of participation? Or is the other side's representative a decision maker, company owner, officer or official? Are multiple people participating? The more people attending, the greater the commitment to seeing the process through. High level officials have other things to do. They generally come to the table with authority to settle. They are attending mediation for a reason: to reach agreement.
- *Statistics are cause for optimism*. Less than 1% of all lawsuits go to trial today. Less than 1%! The percentage of cases that resolve at the mediation stage is very high. That said, a high percentage of lawsuits are dismissed by the judge as not appropriate for trial. Mediators often help parties assess the risk of that happening in any given case. Weighing and examining the risks at mediation settles cases, and often settles them early before substantial fees and transactional costs are incurred. Mediation brings results, and results are the reason mediation has become so popular.
- *Patience is a virtue*. Being patient is a strategic advantage. Some competitive negotiators believe impatience on the other side is a vulnerability to exploit which, in turn, drives their hard ball tactics. No one should start feeling discouraged before Rounds Four, Five or Six. Of course, negotiations are a two-way street. Generally, a party must make a significant move to receive a significant move back. It's called reciprocity. Experienced negotiators are likely to reply to an unproductive offer with their own unproductive offer. Fortunately, reciprocity works the other way also: just as a dinner invitation from a friend encourages us to invite that friend to our house for a payback dinner, a good move at the mediation table encourages the other side to reply in kind.
- *Mediators have the right tools for the job*. Mediators have experience managing the process in even the most intractable, difficult and high conflict disputes. They are trained for it. They have time-tested tools, techniques and interventions that work. Even in late rounds where the gap between the parties is not

narrowing appreciably, mediators have ways to move the process forward and help the participants find an off ramp.

- *Information learned at mediation has value*. Sometimes cases do not settle. That happens. Sometimes two competent advocates reach very different conclusions about the value of a case. Sometimes parties don't have enough information to know whether they should settle and on what terms. Sometimes parties are simply not ready to settle. The mediation process nonetheless provides value and generally makes the return on investment worthwhile. Mediation is, of course, a unique opportunity to step back from the conflict and engage in serious problem solving. Good faith efforts at peacemaking are rarely a mistake. More to the point, mediation is a powerful vehicle for the exchange of information. For a party willing to listen and listen with an open mind, the process often brings forward critical information such as the other side's perspective; their strongest evidence; their best legal arguments; and what their number is to settle the case. Information exchanges at the mediation table provide each side with fresh insight and critical information to better prosecute or defend their positions.

HOW PAST EXPERIENCE CAN MISLEAD

Many people arrive at the mediation table with some general experience negotiating. What's for dinner? Which movie will we see? Shall we vacation in the mountains or at the seashore? Who's responsible for the kids this weekend? Party experience negotiating monetary issues is generally more limited. Experience negotiating lawsuit settlements is particularly limited, more often on the plaintiff side. Limited experience leads to unrealistic expectations; and unrealistic expectations lead to resentments.

Most parties have experience purchasing an automobile, new or used. Their experience is that the asking price or manufacturer's "sticker" price is rarely far from the final sale price. If a purchaser saves $1750 to $2500, for example, he or she feels good about the outcome.

Experience buying or selling a home, is not dissimilar. The gap between the list price and the final sale price at closing is rarely greater than 10-15%. If a seller receives an acceptable offer a few thousand dollars below the asking price, he or she might pat themselves on the back even if they initially dreamed of an offer above list. Low ball offers in real estate are so unusual, they are often flatly rejected, undignified with a counterproposal.

In commercial litigation, parties often have had experience negotiating money. Examples include salary negotiations, the size of a bonus or raise, the price per part of a production contract, the size of a volume discount, or the purchase of a business. Here, too, experience tells the negotiator that the opening number and the final number will not be far apart. As a result, many participants expect the opening offer in their lawsuit will be a short distance from their top or bottom line.

Not so. In litigation this happens only rarely. In fact, the opposite is true. Initial proposals are often in different "ballparks"; and sometimes the ballparks aren't in the same city. Thus, parties are sadly disappointed. Expectations are resentments under construction. When expectations are dashed, the response is outrage, frustration, and resentment. Resentment poisons the well, smothers good will and roils the calm atmosphere generally required for settlement.

LOVE IS BLIND TO RISK

An additional cause of party frustration arises when the Mediator starts asking risk assessment questions. Even mediators who approach risk in a facilitative, non-judgmental mode risk losing party trust and confidence. Has the mediator lost his neutrality and taken sides? "Why is the mediator talking about my weaknesses and risks? Why isn't he in the other room beating up on them?" As it happens, mediators are nothing if not symmetrical. If they're "shaking the tree" to sow the seeds of doubt in one room, parties can count on mediators doing the same in the other. Mediators must start somewhere, however. It's traditional to start with the plaintiff.

Mediators do not spend time on risk assessment without good cause. Risk assessment is essential to the process of finding

an off ramp from the dispute. Risk does and *should* have an impact on evaluation of the claim. The greater the risk, the more parties should be flexible. Does the claim have evidentiary support? Do the contentions make sense? Are the stories each side tells plausible? Are some claims stronger than others? Are the defenses persuasive? What is the legal foundation on which the claims and defenses rest? What are the weaknesses each side faces? Is there documentation? Are the parties and their witnesses credible? What are the risks presented? What's the likelihood of getting past summary judgment with this judge? Will the judge or jury be sympathetic?

Why do mediators explore these questions? There are multiple reasons:

- Opening numbers are generally developed and agreed upon by advocates and their clients well before arrival at the mediation table. Participants look at the strengths of their claims and defenses, and, sometimes, they look at their weaknesses – but generally not as skeptically as they should. Typically, the valuation process includes an assessment of exposure, i.e., the potential value of damage or loss. In preparing to make an opening, parties generally review the legal foundations, engage in some risk analysis and formulate a litigation budget to estimate attorney fees and costs. Regrettably, many participants fall in love with their claims and defenses, thereby coloring the numbers. What do we know about love? Shakespeare taught us that love is blind. Accordingly, valuations brought to a negotiation may be unrealistic, the result of someone sweeping the weaknesses and risks under the rug without giving them proper weight.
- Claim valuation is more realistic after critical weaknesses and risks have been examined. Why? The Mediator's job is to sow the seeds of doubt by shining light on those risks. If participants listen carefully with an open mind, their valuation of the case will and should necessarily change and change in the right direction. A top or bottom line at 9:30 in the morning, therefore, is rarely of any relevance. The top or bottom line at 3 o'clock after time spent examining weaknesses is very relevant.
- Fault and risk conversations soften the parties up and encourage flexibility.
- Settlement numbers that take risk into account and are communicated with the offeror's rationale are generally better received, more seriously considered, precipitate more productive counterproposals, and ultimately result in mutually agreeable settlement agreements.
- The parties are in mediation because they couldn't arrive at a settlement on their own. Fault and risk conversations led by a neutral mediator can assist participants in arriving at a better informed and more realistic understanding of risk and value.

CONCLUSION

If parties know what to expect, are patient and flexible, keep an open mind, plan strategically, listen carefully, make constructive and reciprocal proposals using an understandable rationale, the mediation process will bear fruit.