Managing Opening Offers: "Are You Really Gonna Make Me Communicate that Number?"

By
Sheldon J. Stark
Mediator and Arbitrator
www.starkmediator.com
734-417-0287

Introduction

What is 168,000,000?

168,000,000 is the number of search results on the web for the term "mediation". While there is much to be said about mediation, when boiled down to its least common denominator, mediation is nothing more than an assisted negotiation. Mediators – neutral, unbiased and objective – assist the parties negotiate a settlement of their differences by improving communication; translating messages so they are better heard and received; exploring needs and interests; encouraging realistic assessments of risk; and removing impediments to resolution. Mediators assist in weighing the cost of continuing the conflict and refocus attention on the future. And, when the time arrives to exchange numbers, mediators can help the parties improve their proposals by pointing out the many ways unrealistic, over-the-top opening offers can poison the well, cause consternation and derail the path to resolution. Serving as a counselor and advisor, the mediator assists the participants in developing more productive proposals likely to stimulate positive counter-proposals. This is called "negotiation coaching".[1] If all they do is communicate numbers without push back or comment, mediators add little value. In this article, I will suggest how to "set the table" for a successful mediation process and oversee and encourage a positive and productive pre-mediation exchange of information (Part I); choose the right moment to open the negotiation process (Part II); and provide well-informed advice to advocates and parties to formulate constructive proposals (Part III).

PART I: SETTING THE TABLE: The Pre-Mediation Process

The process of managing a positive negotiation begins long before first numbers are exchanged. A proper foundation must be laid starting the instant all parties agree to our service.

My process is to initiate a pre-mediation conference call with the following elements:

[1] See, https://www.starkmediator.com/articles-links/i-know-what-your-job-is-reframing-the-role-of-mediator/

1) *Logistics*: Make disclosures, learn negotiation history, encourage advance exchange of information and documents, determine whether mediation is voluntary, identify participants and arrange scheduling, duration and due dates.
2) *Process design*: Fit the mediation process to the dispute. Are the parties agreeable to a mediator's opening remarks? Do they prefer an all caucus/shuttle diplomacy model or are they open to joint sessions? Will they set aside traditional zealous advocacy in favor of a joint problem solver mindset? Can we begin with a facilitative approach, becoming more evaluative only after the process has unfolded and the parties approve?
3) *Dispute dynamics*: Obtain a preview of the conflict and its peculiar dynamics to better prepare myself for service. To view the pre-mediation conference call agenda, see https://www.starkmediator.com/wp-content/uploads/sites/4/2019/06/Agenda-for-PreMediation-Conference-Call.pdf

I encourage the lawyers to take full advantage of the unique opportunity presented by mediation to speak directly to the decision maker on the other side. Rather than default to an all-caucus, shuttle diplomacy model in every case, I suggest they consider the option of joint sessions and how joint sessions might be productive. I assure them I have the experience and skill set to manage the process safely. In my experience joint sessions work and work well. Rarely do I see the "nightmare" scenarios the advocates fear so much. If things start to go sideways, moving back to caucus is always available. See, https://www.starkmediator.com/why-you-should-consider-joint-sessions-in-your-next-mediation-2/

I remind participants that mediation is not a fact-finding process. It is not an adjudicatory process. Mediation doesn't determine who is right and who is wrong. Nor does it establish who is telling the truth and who is not. I'm not a decision maker. There is no need to persuade me. Rather, mediation is a dispute resolution process. The decision maker is on the other side. When the parties serve as zealous advocates, therefore, they antagonize rather than persuade one another. Accordingly, I ask them to commit to being joint problem solvers. Everyone at the table has the same problem: mediator, advocates and parties. How do we resolve this dispute? What does it mean to be a joint problem solver? Joint problem solvers don't try to score every point. Joint problem solvers make reasonable concessions. They use the language of diplomacy. They try to *understand* each other's perspective whether they agree or not. Joint problem solvers listen to each other with an open mind. Mediation is also an opportunity to learn information critical to proving claims and defenses should the matter not settle. And, of course, if the dispute does not resolve, everyone is free to return to traditional zealous advocacy. I urge the lawyers to inform their clients of these changes to avoid the impression counsel has lost faith or confidence in the representation.

I provide educational materials to assist the litigators and their clients in preparing for mediation. https://www.starkmediator.com/wp-content/uploads/sites/4/2013/10/2013_Article_Making_the_Most_of_Mediation.pdf

I offer suggestions for developing a strategic mediation plan to better achieve their goals. https://www.starkmediator.com/a-success-primer-for-mediation-achieving-client-goals-through-strategic-preparation/ [2] If the parties are willing to participate in a joint session, I offer materials to assist them in putting their presentations together. https://www.starkmediator.com/wp-content/uploads/sites/4/2020/04/Stark-Mediator-Effective-Presentation-Directions.pdf

Helping the parties learn to get the most out of the mediation process gains their trust, gives them hope, improves their preparation, and helps them achieve more of their goals and objectives. Our professionalism and process assistance build their confidence in us, creating an openness on their part when the time comes to listen to our suggestions and follow our advice.

EXCHANGING INFORMATION: Written Mediation Advocacy

I encourage the lawyers to *exchange* their mediation summaries and to do it a week in advance. The more each side is familiar with the theories, approach, evidence and arguments of the other, the better prepared they will be to respond to important points while sitting at the mediation table. Receiving the summaries in advance gives each side time to research and pull together their own information in response[3]. On the other hand, if the information in the written submissions is confidential and not disclosed to the other side, the mediator is "hand-cuffed," restricted in regard to which risk issues to address. In an employment dispute, for example, defense counsel may point out confidentially that plaintiff falsified his application for employment, committing resume fraud. Perhaps they're saving it for the plaintiff's deposition or for cross examination at trial.

Since mediation settles most disputes and trials occur in less than 1% of all cases, saving it makes little sense. Far better that plaintiff's counsel be aware that her client's credibility is compromised when evaluating the risk of non-resolution. Openly sharing the information gives the mediator a tool for exploring the risk of effective impeachment.

I also provide an option to supplement shared submissions with a "mediator's eyes only" letter, particularly where advocates are not ready to share every piece of sensitive information such as client needs and interests. If the parties have particular non-monetary goals and objectives for the mediation process, this is an opportunity to let the mediator know in advance. An apology or acknowledgement, for example, or a letter of introduction or neutral reference, a *nunc pro tunc* resignation, retention of company car or computer, future business opportunities, reputation repair, etc.

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[2] Parties who prepare for mediation by developing a strategic offer/concession plan in advance generally do better than those who "plan" to bargain reactively. Reactive bargainers may not exercise their best judgment in negotiation when buffeted by the winds of emotion. Negotiators who bring an offer/concession strategy to the table must be flexible, however, prepared to make adjustments based on what they learn through the process.

[3] This prevents parties from avoiding discussion of a risk because, they assert, there wasn't time to investigate or they hadn't anticipated an issue.

I also recommend focusing their writing on persuading *each other*. The decision maker on the other side should be their primary audience, not the mediator. See, https://www.starkmediator.com/articles-links/crafting-effective-mediation-summary-tips-written-mediation-advocacy/

Regrettably, some advocates believe their own client is the principal audience. This generally results in a summary filled with verbal assaults and invective which only serves to antagonize or alienate at the very moment their goal should be getting through to the decision maker on the other side. Sometimes their zealous written advocacy pushes beyond what the evidence supports, and – while it may earn kudos from their client - undermines their credibility with opposing counsel. If they have the "goods," they should highlight them with exhibits and attachments. If they don't, exaggerating and making unsupported inferences is not helpful. All these problems have an impact on opening numbers because they drive emotions – both ways. They "rev up" their own clients and create unrealistic expectations that the lawyer then asks the mediator to help walk back. And, it typically serves to further alienate or escalate readers on the other side.

Sometimes advocates close their written submissions with a settlement offer that is irritating at best, incendiary at worst. Numbers are always the loudest message, and an aggressive number in a mediation summary sends a powerful unintended message: *This case is not going to settle because I have a totally unrealistic assessment of its value!*

At times the number is orders of magnitude higher/lower than previously communicated. The message received: we're wasting our time. One side may have agreed to participate in mediation because the last offer was within a reasonable range. When the mediation summary has a far different number, the result is *bad.* It leads to outrage. Emotions escalate. Parties threaten to walk. Precious time, energy and capital is spent calming the waters and encouraging parties to give the process another chance.

Don't misunderstand me: If an advocate can blackboard significant numbers, their summary should surely disclose them. Their theory of damages and how the numbers were arrived at should be provided and explained: Lost wages and benefits in an employment case; medical costs, replacement services, economic loss and mental pain and suffering in an injury case; or lost profits in a commercial transaction gone bad. Opposing parties need to know in advance how damages are projected in order to evaluate the situation and obtain sufficient authority to settle. But, an over-the-top dollar figure at the end of the summary to "show how serious this case is"? Not so much! See, https://www.starkmediator.com/wp-content/uploads/sites/4/2019/07/Why-You-Should-Avoid-Putting-A-Dollar-Demand-Offer-in-Your-Written-Mediation-Summary.pdf

Spending the first hours of the mediation process dealing with consternation caused by a provocative written number is frustrating for the mediator and everyone else at the table. It is often followed by a whole litany of complaints and accumulated grievances about how the other side has handled every aspect of the litigation. "Shel, I need to put this number in

context, so you understand why we're so disappointed!" Provocative numbers undermine good will and derail our best efforts to reach an agreement – to say nothing of the added expense to parties forced to pay for the wasted hours in attorney and mediator time.

PART II: ARRIVAL AT THE MEDIATION TABLE: Timing

Who Goes First?

One of the most important questions for the day of mediation is "whose turn it is to make the first offer?" If there have been no prior negotiations, most negotiators and negotiation coaches believe it is the plaintiff's turn to put out the opening number. First, it is traditional for the plaintiff to start. (It confuses the defense when they don't want to; and not in a good way.) Second, plaintiff brought the case. Presumably, plaintiff knows the value of his or her claims. Accordingly, Plaintiff should tell the defense what he/she wants. Third, "anchoring" research shows going first is in plaintiff's best interest.[4]

If a party made a settlement proposal before arriving at the mediation table, it is the offerees responsibility to respond and throw out the first number once the mediation process kicks off. I liken it to a tennis match: One party lobbed the ball over the net by making an offer before mediation, the other party should lob it back with a counteroffer.

This should be simple, straight forward and commonsensical. Years ago, when I represented clients, I wouldn't have dreamed there was any controversy around this. Turns out, there is. The same arguments are made by advocates on either side of the "v.": "We didn't reply to the offer because it was outrageous. Tell them to give us a reasonable number and we'll answer it." Experienced mediators know this to be a fool's errand. Every advocate on the planet rejects such requests with righteous indignation: "I'm not going to negotiate against myself! This is the number. If they don't like it, we're done here!" As noted in Part III, there are techniques to help us move past this potential impasse.

Advance Preparation

Most participants reach the table on the day of mediation with a top or bottom line or range for what they hope to achieve. Some have a strategic plan in the form of an offer/concession strategy. The best are also flexible: They bring a plan, but they listen and adjust based upon fresh insight or new information. Typically, they have conducted a thorough review of their file, analyzed the facts and law, diagnosed the risks as then understood, identified the strengths and weaknesses, calculated potential damages or loss and assessed the amount of their claim or

[4] Opening offers have a strong effect on negotiations. "The first offer typically serves as an anchor that strongly influences the discussion that follows. In research documenting this price anchoring effect, psychologists Daniel Kahneman and Amos Tversky found that even random numbers can have a dramatic impact on people's subsequent judgments and decisions." From the Harvard Project on Negotiation. https://www.pon.harvard.edu/daily/negotiation-skills-daily/price-anchoring-101/

exposure. Sometimes the lawyers have negotiated with their own clients about settlement value[5]. Most often, based on their top or bottom line, they establish their opening number and obtain client approval. As mediator, are you ready to hear it? I suggest not. I recommend investing time in risk assessment *first* before soliciting a party's previously prepared opening number.

If the mediator does her job properly, that opening number might very well change in a good direction as a result. Here's why:

No one can exercise good judgment about whether to settle and on what terms unless and until they have as much information as possible. Mediation is an excellent process for the transfer and sharing of information. Mediators are responsible for making certain each side has all the information available so the parties can exercise good judgment.[6] Assuming the participants are open minded and flexible, their opening numbers *after* a robust discussion of risk will be far more productive than not. Such information includes *inter alia*:

- What is the story each side tells and is that story plausible? If plausible, what are the chances a decision maker will find it persuasive? Is the story sympathetic and easy to tell? Will the jury have the patience necessary to listen to the end? If the story is believed, what is the most likely outcome?
- What is the best evidence each side can marshal? How persuasive is it? What is the risk such evidence will be excluded by a Motion in *Limine?* Does exclusion of the evidence increase the likelihood and risk of an appeal – requiring more time, more attorney fees, more risk – and possible reversal?
- How credible are the witnesses – the parties in particular – and how do they come across? Will a jury like them? How likely are they to motivate a jury their way? What impeachment material is available? Does anyone *appear* to be lying even if they are not?[7]
- What's the judge's predisposition? What's the court's track record granting or denying dispositive motions in similar cases? What's the risk this dispute will be dismissed, or the sails trimmed in some crucial fashion?
- What might jurors be like in the venue where trial will be held? In employment cases, for example, Wayne County jurors generally believe an employer must have good cause to terminate an employee. In Kent County, by contrast, every juror is familiar with the

[5] Settlement negotiations often resemble a three-ring circus. In the left ring, plaintiff's counsel is negotiating with her client, trying to rein in overly optimistic expectations. In the right ring, defense counsel is pressing defense representatives for more authority to reach a settlement number. In the center ring, the advocates negotiate with one another over a final resolution.

[6] Will Rogers taught us that good judgment comes from experience. Experience, he added, comes from bad judgment. The hope is mediators have had enough experience to bring good judgment to the process.

[7] When Jack Lemon was a young actor coming up in Hollywood, George Burns took him under his wing. "Kid," he supposedly advised, "in this business sincerity is everything... (pause)… And if you can fake that, you've got it made!"

employment at will doctrine. Do verdict sizes in Genesee County differ from those in Ottawa County?

- As no more than 1% of all cases in state and federal court make it to trial, what is there about this dispute that might be different? And, in the wake of the COVID-19 pandemic, when does anyone expect to see a jury trial at the courthouse?
- What are the big risks for each side? Where are the holes in the claims or defenses? Perfect cases are few and far between. Rarely is liability a "lay down hand" or the defense a "slam dunk". Longtime trial lawyer turned mediator William "Bill" Sankbiel, likes to say, "I've never seen a case I couldn't lose." If the parties try the case 10 times, how many times would the plaintiff recover a verdict? How many times a "no cause?"

The "Softening Up" Process

In my experience, litigators focus on their strengths and minimize their weaknesses. Parties sometimes convince themselves they have *no* weaknesses. Parties and advocates are both prone to fall in love with their claims and defenses leading them to sweep potential "warts" under the carpet. As Shakespeare taught us, "love is blind." *The Merchant of Venice, Act 2 Scene 6*. For that reason, the opening numbers parties bring to the table may reflect a myopic – and therefore unrealistic – vision of risk. Risk impacts valuation. Most people prefer to manage their risk than take a chance on the outcome of a dispositive motion or trial. As a result, the more appreciation a party has for risk, the more reasonable their numbers. Mediators help the parties examine their risks in large part to challenge party certainty about the outcome and enhance flexibility in a productive direction. Accordingly, the numbers parties had in mind at 9:30 am are not as relevant as their numbers several hours later after engaging in risk assessment. *Then* is the time to place numbers on the table for consideration.

After examining their risks, a party may remain resolute, stubbornly attached to the numbers they came with. Okay. It's their case, their money, their decision. We should, however, understand why.[8] Parties may prefer to take their chances at trial notwithstanding the risks. No problem. That's their right.

Mediation is a voluntary process. Settlement is voluntary. Mediators assist in the negotiation, they do not compel resolution. While the parties may request a mediator's proposal and some of us are willing to provide one, it is not generally our job to tell the parties what their case is worth.

This is their conflict; their right; their risk; their money. But, before they choose between settling and rolling the dice, it's our responsibility to identify and help them weigh those risks realistically. If they remain steadfast, that is their choice. On the other hand, if the parties and counsel have been doing things right, they have been listening and processing what they heard. They have learned invaluable information. Perhaps they learned something new, or arrived at a

[8] Was the original number approved by a committee or significant other, for example, who is not available to discuss making a change? Perhaps an adjournment is in order.

fresh understanding, or recognized a risk previously overlooked, or increased concern for a problem previously minimized. After several rounds of offers and counteroffers, they probably have a much better appreciation of how far apart they really are.[9] In other words, they have received value for their investment in the mediation process.

When is the Right Time?

Knowing when to solicit an opening number is a judgment call. While we are engaged in "softening them up" the parties may grow impatient. "Can't we cut to the chase? Look what time it is!" Impatience can be driven by many factors: attorney and mediator hourly rates; frustration with progress; pessimism about whether the dispute will settle; resentment that their beloved theories are challenged, etc.[10]

To address impatience, I point out that if the case doesn't settle, there is great value in letting the process unfold. Enhanced risk assessment, better understanding of how the other side will present their claims or defenses, a sense of the other side's best numbers, and appreciation for where each side is coming from are invaluable. Good advocates want and need this information. It helps them do their jobs. Good lawyers are often helpful in tamping down party impatience. They recognize the value of information. Party impatience nonetheless must be respected. Accordingly, I make strategic decisions: which risks to discuss first, what to save for later rounds, and when to back off. Strategic mediators always save a few good risk questions for later rounds to generate additional movement when needed.

"After You, My Dear!"

When the time comes to open the exchange of numbers, it is helpful to know the negotiation history. What numbers have previously been exchanged, if any? Most parties are willing to share.[11] As noted above, if there have been no discussions, the first number should come from the plaintiff.

Sometimes, however, plaintiff counsel wants the defense to throw out the first number. I try to discourage that. "In the history of American jurisprudence," I like to say, "no plaintiff's lawyer has ever been happy as a result of making defendant go first." It confuses defense counsel. It undermines plaintiff's credibility and reduces respect for counsel's judgment. It sharpens suspicion. "What are they up to?" Because an opening defense number is likely to "anchor"

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[9] If it is unclear how much a party has been educated by the process, it can be helpful to ask them in a private caucus setting to articulate where the other side is coming from in their own words. It can also be helpful to ask parties to list the risks they themselves face.

[10] Impatience can be very real. Pressure to move faster, however, can also be an effort to hijack the discussion and avoid facing hard truths.

[11] Practice tip: Always ask about negotiation history with both lawyers present. It's remarkable how often they do *not* agree as to who made the last offer or how much it was! As a matter of routine, I ask for negotiation history in the pre-mediation conference call when all lawyers are on the call. If they've exchanged offers in writing, I ask for copies.

the negotiation at a disappointing level, making the defense go first is rarely in the plaintiff's best interest. See *supra at fn 4.*

Where the defense should open because plaintiff presented a demand prior to mediation, they sometimes demand a *new* number from plaintiff. If defendant treated the demand as unserious and refused to respond, they may be equally reluctant to do so at the mediation table. "We're not in the same ballpark. Our ballparks aren't even in the same city! How do we respond to that? We can't!" To avoid impasse before we've even started, I am generally willing to request a new number from plaintiff "for purposes of mediation." "Yes, it's their turn," I say in plaintiff's caucus room, "but your number didn't reflect *any* risk. Much time has passed. A lot of water under the bridge. You have a lot more information. You acknowledge the number was your best day in court – and maybe then some. They're been unwilling to reply. They remain reluctant. Now that we're here and we've had a good discussion of risk, will you at least consider proposing a more productive number that takes some of that risk into account?" Sometimes, after deliberating, plaintiff counsel agrees.

If not, I return to the other room and seek flexibility from the defense side. There are several ways to move forward.

- "What number *would* you respond to? If they started with a better number, what would your counter have been? Can I offer your hypothetical counter and explain that you've authorized me to make it on the basis that you're trying to show good faith not respond to an unrealistic demand?"
- "You think this is a ridiculous, unrealistic number and you're worried about the message you're sending if you reply. Why not respond with an equally ridiculous number and send the same signal back?" I call this the "bookend" approach learned from Jon Muth.
- "What if we pretend this is already Round 2? Where would you expect to be to get Round 2 off to a good start? If you authorize a good counter, I'll work hard to get you a number you haven't heard before that you maybe also won't like, but you'll see it as progress."

When the parties have agreed to mediation voluntarily, it is rare that one or the other intervention doesn't get the negotiation moving.

PART III: MANAGING OPENING OFFERS

Communicating Unrealistic Numbers – or Not!

Because opening numbers can threaten to derail the entire process, I am a strong believer in pushing back when the mediator anticipates a hostile reception and risk of an equally aggravating response.

Often, opening offers reflect battles fought long before we arrived at Mediation. Opening offers may be hampered by this history. Sometimes the opening proposal is a significant

departure from a number previously communicated. For example, perhaps someone offered a modest number "way back when" intended for a "quick and dirty" resolution at the beginning of the litigation process. Even though rejected at the time, "quick and dirty numbers" retain an emotional power. Offerees in this situation consider the new numbers "negotiating backwards," and express deep resentment.

Even when much time has passed, significant sums have been expended on attorney fees in the interim, or lost profits or lost wages have accumulated, the offeree can't stop thinking about that earlier offer. Of course, "nothing is more expensive than a missed opportunity." H. Jackson Brown, Jr. "That was then," I like to say. "It didn't happen. This is now. Mediation is a forward-looking process. Let's try to move forward from here."

Thomas Jefferson famously preferred "… dreams of the future to the history of the past."

Recognizing Unrealistic Opening Numbers

How do we know when a number is too aggressive? I try hard to remain neutral as long as possible. I try not to form an opinion about the merits *or* the value of the case until I know significantly more than I'm likely to know when the first numbers are communicated. I may never know "the right number." Ultimately, the "right number" is for the parties to determine. Nonetheless, it's generally as clear as day when an offer is totally out of whack.

First, of course, offerees *tell* you what's wrong with the number. They may or may not be spinning us. Listen to their reasoning. Does it make sense? After years of service as a litigator and mediator, I may not be ready to say what the case is worth, but I generally can tell whether we're dealing with a five, six or seven figure claim. If a demand is multiples of projected economic damages alarm bells should be going off. If a demand exceeds policy limits, it doesn't take a ton of experience to question how it will be received. If the goal is to keep the negotiation going, something must be done.

Accordingly, I ask permission to push back. Will they consider whether there's a better way to open?[12] No one has ever refused to engage in reconsideration – whether they ultimately change their number or not.

- "Why would you choose to start with an over-the-top, hyper-aggressive offer?" The answer usually begins with "They need to understand that this is a serious case and we're not fooling around!" In fact, such numbers send the opposite message. "What do you think will be their reaction? What if you were in their shoes? Whatever message you intend, what message will they receive?" "Is there a risk they're going to walk out?"
- Or, I ask them to anticipate the number they'll hear back. "What number do you expect in reply?" Experienced plaintiff's lawyers generally acknowledge it will be in the "insult"

[12] I often hear criticism of mediators who simply carry numbers back and forth. Litigators tell me they *want* a mediator who pushes back and offers suggestions for more productive proposals. "That's what we hired *you* for!"

range. "If that's the case," I ask, "why start there?" If the demand exceeds policy limits, I ask their experience with previous insurance carriers. "Have you *ever* settled a case in excess of policy limits? Let me ask it another way: when was the last time you settled a case *for* policy limits without a trial?" And, of course, the bigger the disparity, the easier it is for the other side to say no. The recipient might just as well spend the money on defense, take the risk and hope for a better offer down the road.

- "Is the number an 'outlier?' Won't they recognize it as such? Isn't this number many multiples of your actual losses? What's their incentive to continue the mediation process?"
- If the offeror initially won't recognize their numbers risk ending the negotiation, I share the reaction I anticipate based on past experience. Overly aggressive numbers cause consternation. They aggravate. They inflame. They incite a reaction and it won't be pretty. The other side may well conclude that they're wasting their time. The wheels can come off the bus. Over-the-top numbers can bring the process to a screeching halt with the parties even more escalated than they were before.[13] "Isn't it a bit early to start down that path? Do you want to run that risk? Or would you like to try something else?"

I don't tell parties what they should settle for. It's their case, their claims, their lives, their money. My coaching addresses first numbers, not last.[14] I tell plaintiffs I don't know what their bottom line is, and don't want to know.[15] Surely, they've included enough water in their opening number that there is ample room to move in the early rounds of negotiation. I urge taking a small risk to see if their "generosity" is reciprocated. If it isn't, there's ample time to slow down and dig in.

I understand I'll never know the case as well as the advocates. There may be many important things of which I am not aware. In other words, my coaching advice can be off the mark. Accordingly, parties should not feel compelled to accept my recommendations. "If you don't follow my advice, it doesn't hurt my feelings," I like to say. "You know the case far better than I do. Feel free to ignore what I've said."

If the party *insists* I communicate an over-the-top offer I will do so. Before the other side explodes, however, I remind them they have three options:

1). They can pack up and bring the negotiation to a halt. I encourage rejection of this option.

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[13] This violates "The First Rule of Mediation: Do No Harm." Allen T. Stitt, ADR Chambers, Toronto, Canada. Stitt cautions that mediation should not make the relationship between parties or counsel worse than it was before. He believes it is our job to manage the process and attempt to *prevent* escalation.

[14] Where necessary, of course, I am always ready to coach closing numbers as well.

[15] Dick Soble taught me not to ask. The answer is rarely honest and generally paints the party into a corner it's difficult to get out of. I've heard their "bottom line", their "bottom bottom line", and their "bottom, bottom, bottom line." Moreover, as noted, the top or bottom line in the morning is far less important than the one modified by rigorous risk assessment.

2). They can stay and proffer an equally unproductive counteroffer mirroring the offer.
3). They can remain and propose a number that gets the process back on track. "Can you be the mature, sensible party this morning? We can certainly wrap the number in an explanatory message. I'll even help you craft it. For example, 'To us, your last number was unproductive. We thought about leaving, but we want to show our good faith and willingness to reach resolution. We came here to settle, but we obviously have serious disagreements about value. We've authorized the mediator to communicate the right number for *this* round. And, we still have room to move. This is not a take it or leave itl. Please don't read this as a sign of weakness, but a sign of our resolve: an effort to keep the process going in a case that really should be settled.'"

Unfortunately, even when the party selects Option 2 or Option 3, the atmosphere may be poisoned and the foundation for a sound, productive negotiation jeopardized. Ironically, if the counteroffer is the equal opposite (Option 2), it is almost inevitably met with disbelief, consternation and complaint from the very negotiators who started it. Competitive bargainers don't like it when the other side fights fire with fire. It sometimes helps to ask the offeror, now visibly upset, to "join me on the balcony", look down from a process perspective, and recognize that the other side has its own valuation. "This probably isn't the number they planned to start with. They are simply responding to an unrealistic demand with an equally unrealistic counteroffer simply to close the round. Don't jump to the wrong conclusion about where they really are."[16]

Sometimes, over-the-top offers and matching counteroffers can result in multiple rounds where the parties move in inches, continuously antagonizing and frustrating each other. This is human nature. We act reciprocally.[17] Too many reciprocal baby steps and our mediator optimism starts to lose its attraction for the participants. I ask whether the lawyers would like to avoid such a "death spiral." Instead, I suggest that it might be worth taking a risk and starting with a more realistic demand. "Reciprocity works both ways," I explain.[18] "If you make them a productive offer, I'll do what I can to persuade them to return the favor. We call that making reciprocal concessions. If they don't reciprocate with a number that affords you optimism, it's still early. You won't have given away much, you retain ample room to move and you can slow back down in the next round. They will get *that* message." This approach encourages both parties to "fast forward" the process, reward good behavior and reinforce productive proposals.

Developing a Rationale for Each Offer

[16] As you might expect, before communicating an equally aggressive counteroffer, I push back in that room. Mediators must be symmetrical and even-handed. I consider it equally my obligation to manage opening counteroffers.

[17] This danger is reduced where the mediator has encouraged the parties to develop in advance an offer/concession strategy.

[18] See *Influence, The Psychology of Persuasion* by Robert B. Chialdini, Ph.D., "Chapter 2, Reciprocation: The Old Give and Take … and Take." Harper Collins.

Offers that come "packaged" with a solid rationale or explanation are the most productive. If the offeror has not brought one to the table, I help develop one. A rationale avoids the dead end of "my (arbitrary) gut feeling is better than your (arbitrary) gut feeling." In an employment discrimination case, for example, plaintiff should pull together a breakdown of economic losses, past and future.

- What assumptions is the breakdown based upon?
- When do you expect plaintiff will find comparable employment or get back on her feet?
- If future damages are an element, how many years are projected and why?
- In an age case, for example, when did plaintiff plan to retire?
- Attorney fees are recoverable as an element of damage in discrimination and civil rights cases. Accordingly, the lawyers should check their billing records for a precise accounting of attorney fees and costs to include in the explanation. Attorney fee dollars complete the plaintiff's rationale.

A much more productive negotiation results when the defendant can see the assumptions and address them from the defense perspective. By laying out *its* assumptions, the defense presents a rational basis for a counter number. Rationales provide the basis for a productive discussion.

The same principles apply in a commercial case. If experts have been retained, I encourage the lawyers to exchange their damage reports. If they haven't hired experts, I ask them to bring lost profit documentation and how they expect to project damages at trial. Again, an exchange over specific numbers and assumptions is more productive and less frustrating than stubborn generalized "gut feeling" proposals and counterproposals without a rational basis.

If the mediator can get the first exchange of numbers off to a good start, chances are subsequent rounds will also be productive and less frustrating. A properly managed opening round lays the foundation for a resolution both sides can accept.

Conclusion

The mediator's role is to assist the parties in negotiating resolution of their conflict. Negotiation coaching is an essential component of that. As the only person who spends time in both rooms, the mediator is uniquely situated to give insightful coaching advice in the negotiation process. Mediators choose the best time to introduce the exchange of numbers. Mediators anticipate how offers will be received and what the reaction might be. Experienced counsel *ask* for the mediator's take on such questions. Parties willingly consider mediator coaching *because* we have gained their confidence in us and our judgment. They have placed their trust in us and *want* to know what we think. We have provided them with a good process, read their papers, listened to their stories, asked good questions, understood their perspective, and explored the cost of continuing the conflict. We helped identify and weigh their risks neutrally and objectively. We explained why we think they should modify their proposals or buttress them with additional rationale. As a result of the effort we have made, parties are willing to listen to us and follow our counsel. Coaching makes a difference. Managing opening

offers matters. Coaching may not guarantee success, but it does reduce contention, encourage rational exchange, and dramatically improve the prospects for a WIN/WIN resolution.