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# Kluwer Mediation Blog

## Common Ground

Jeffrey Krivis (First Mediation Corporation) · Friday, October 24th, 2014

The X factor in mediation is the ability to influence the other side to pay more or take less. Finding the elusive X factor is the challenge for most mediators, and is often done in the face of uncertainty. This uncertainty takes many forms and can serve as a barrier if not acknowledged and addressed by the parties. Taking the uncertainty out of the negotiation requires the mediator to convey to each of the parties the ability to be strategic while at the same time presenting each negotiation move from a positive perspective.

### Got Milk?

If we offered you a tall glass of ice cold milk after you just finished eating a plate of freshly baked chocolate chip cookies, would you accept our offer? We think the odds are in our favor that you would say yes. What if we offered you that same glass of milk after you just finished eating a plate of fresh baked Atlantic salmon over a bed of sun dried tomato risotto. Under this set of circumstances, it is more likely that you would say no. Although our offer (i.e. the glass of milk) did not change in any way, the circumstances immediately preceding the offer were quite different in the two scenarios. In the first instance, the cookies made the glass of milk *appear* more palatable and enticing while in the second instance, the idea of drinking milk after such a heavy meal might have even made you feel repulsed or disgusted. By altering the circumstances immediately preceding an offer, you can influence another's frame of reference and their perception of the offer's appeal.

Take for example the situation where both sides have goals of ultimately settling the case for around \$200,000. The plaintiff starts the negotiation by demanding \$1,000,000 and the defendant responds with an offer of \$25,000. Had we not revealed the parties' intended endgame of \$200,000, there would *appear* to be little probability of settlement in light of their extreme respective positions. The figures proffered by the parties give little clue to the other side about how each actually values the case, leaving neither side willing to negotiate in the dark. The plaintiff won't feel comfortable responding to the unrealistic offer of \$25,000 and the defendant will need reassurance that the plaintiff intends to come off their "pie in the sky" figure of \$1,000,000. By making an offer that is viewed as extreme, the negotiator is likely to get a response that is equally, or even more extreme, which could paint the party into a corner with few negotiating options.

In order to put a positive perspective on the negotiation, while not leaving money on the table, the strategic negotiator will select an initial position that is exaggerated just enough to serve its intended purpose while providing the other party with a figure they can contrast and respond to. If the goal is to settle the case for \$200,000, the aim should be to make an initial demand that sends that message to the defendant, producing a negotiation volley that plays out in a series of small reciprocal concessions and counteroffers, which will ultimately result in the final dollar figure being sought.

### **You Scratch My Back, I'll Scratch Yours**

When giving a gift, it may be because you enjoy the mere act of giving, but it may also be because deep down, whether you acknowledge it or not, you are hoping to receive something in return. We suggest that the next time you give a gift or do a favor for another, look inward and consider whether there is a part of you that seeks reciprocation in some form from the recipient. Do not be alarmed if you find that motivation, because as it applies to the business realm, a voluntary gratuitous move has significant appeal and the power to make people feel obliged to reciprocate in some form in the future. The form of reciprocation varies greatly and can take the shape of currency, recognition or closure. People are hard-wired to feel obligated to repay favors, gifts or invitations regardless of whether they wanted the favor, gift or invitation in the first place. As a result, a person who feels indebted to another is likely to say “yes” to a request, even when in all other circumstances, they would have said no.

Consider what happens when walking into warehouse department store like Costco. As you walk into the store, you will find salespeople in just about every other food aisle passing out samples to anyone who walks by them. Once you have finished the food sample, the salesperson generally asks whether you liked the item. Having just eaten the food contained in the bite sized cup, you reply, “yes”. At that point, the salesperson points to the bulk sized food item stacked neatly behind her and offers one, to which you feel obliged to reciprocate by replying “yes”.

Likewise, the Hare Krishna Society took advantage of this reciprocation phenomenon by soliciting contributions in public places by *first* giving the target person a “gift” such as a book or flower and *then* requesting a donation to the society. Clearly, even an unwanted favor (i.e. the food sample or flower), once received, will produce a sense of indebtedness that can later be capitalized upon. When negotiating, try to create that sense of indebtedness in your adversary by granting an extra discovery extension, providing copies without asking to be reimbursed, or extending a courtesy you normally would not — make sure to do these “favors” before you start negotiating so that they don't appear tied in to your settlement request. Once your adversary has received something unexpected from you, he or she will feel obligated to repay the favor and champion your cause, making it that much more likely that the settlement scale will tip in your favor at the end of the day.

### **I'll Promise, If You Promise...**

People tend to lock themselves into extreme and unrealistic positions at the beginning

of a negotiation only to feel obligated to act consistently with those positions throughout the negotiation and not appear weak. You can tap into and harvest this sense of obligation from your adversary by engaging in a series of trades with him or her during the negotiation process. To illustrate, suppose that you have a case that you would like to settle for \$80,000. You last demanded \$125,000 and they responded with an offer of \$40,000. The discussions have hit an impasse and everyone has emphatically declared that they are done negotiating. You could continue the traditional negotiation volley ... which likely won't get you very far very fast. Or, you can view this as an opportunity to bracket the negotiations and gain an advantage by getting agreement about the value of the case from your adversary.

First, start by obtaining their agreement that the value of the case falls within a range such as \$60,000 - \$100,000. Second, make sure that the range you are agreeing to *includes* the amount that you are striving to settle the case for; in this example, \$80,000. Third, establish that your respective case values are both right because both are in the agreed range even though you are at the upper end of the range (\$100,000) and they are at the lower end of the range (\$60,000). This is a relatively small commitment and should not be that difficult to acquire because no one is conceding anything at this point. By establishing agreement to a trivial request such as this one (that you are both in the range), you will have increased the likelihood of your adversary's compliance with a similar but larger request even though the larger request is only remotely connected to the smaller earlier request.

Make your final move toward closing the deal by coaxing the other side into a *mutual* commitment. You say, "I promise that I will recommend \$80,000 to my client, *if* you promise to make the same recommendation to yours. It's not a value that either of us wants but it's one that is within the range we *both* placed on the case." Knowing that your adversary will inherently feel the need to reciprocate your commitment and remain consistent with the position he or she just took, i.e. that \$80,000 is within the range of reasonable values for this case, it is all the more probable that they will agree to make your requested recommendation. If you acquire their commitment to make this recommendation, be confident that they will do their best to get their client's authority to settle the case for \$80,000, because to do otherwise will only serve to tarnish their reputation for consistency.

### **You Like Me, You Like Me Not**

As a general rule, most people would say that it feels good to be liked by others. Having said this, there may be other reasons for wanting to be liked than the inherent positive feeling it produces in and of itself. Most people find it easier to say yes to the requests of someone they know and like rather than an individual they dislike. For those of you who are immediately likeable to one and all, read no further. For the rest of us, however, here are some factors that play a role in why some people are liked more than others and how you can tap into the likeability continuum and make it work for you in the negotiating process.

Despite its political incorrectness, the fact remains that individuals who are physically attractive are, generally speaking, automatically assumed to possess such traits as talent, kindness, honesty and intelligence. These positive attributes then transfer to

the way these people are viewed by others, making them more appealing. On top of that, once these people are perceived as more likeable, they will have a better chance of persuading others to change positions to those that are more favorable for them. An example of how this appeal or charm factor plays out in the legal arena is the way your plaintiff-client *presents* to the defense, a jury, a mediator or an arbitrator. A plaintiff who is attractive, well-groomed and articulate is likely to obtain a more favorable settlement than a plaintiff with the same set of facts who does not possess these traits. This principle applies equally to criminal defendants, with studies demonstrating that attractive defendants are twice as likely to avoid jail as unattractive defendants. For these reasons, attractive people are more persuasive in terms of getting what they request, being given the benefit of the doubt and in changing others' attitudes.

In addition, we tend to enjoy the company of people who are similar to us, whether it's relative to our opinions, personality traits, background or lifestyle. As a result, if you want to entice the person your request is directed to, you may want to try to appear *similar* to them in some fashion. This doesn't mean that if their hair is parted to the left, you should do the same, but rather try to find some connection that you share with the other person, thus drawing you closer rather than further apart. These similarities, no matter how small, create a connection that gives the other person an additional reason to buy into your argument as to why the case is worth what you purport it to be. For example, you want your opponent to agree with you that a loss of earnings capacity exists in this case, so you proceed to find the similarities between yourself and him or her, i.e., you both have dogs, enjoy golf and drive a Beemer. Having highlighted these similarities, your adversary is more likely to consider that you two are not all that different, your argument will be given, and that your argument, therefore, may not be as far fetched as he or she once thought; your argument will be given additional weight and consideration because it now comes from someone who appears *similar*.

Finally, increased familiarity through repeated contact with a person is another aspect that tends to increase the appeal factor of that person. Make every effort to focus on the familiar and create a connection with your adversary, even if one hasn't become readily apparent as of yet. Remember what it feels like to listen to a great Sinatra record, and tap into that sense of familiarity with your adversary. For example, if you have been litigating a case for several months and have spoken with your adversary only once at a case management conference, which you appeared for by court call, it's possible they are not familiar enough with you to be receptive to your settlement overtures. You have never actually seen one another and have only *heard* each other once while on court call. Now, you're ready to talk dollars to settle the case. Although this presents an exaggerated scenario of *unfamiliarity* with your adversary, it is not completely implausible. You are more likely to persuade your adversary when negotiating if you have reached out and made personal contact with him or her during the weeks before you make that first offer or demand, even if it's for a relatively trivial matter such as confirming a future court date or collaborating on selecting a mediator. Having had this repeated contact on neutral ground, both you and the other party will be at ease, leading the way to a more productive and profitable negotiation.

### **Going Once, Going Twice, Gone!**

Picture yourself at an auction and imagine having your eye on an 18th century desk during the preview; the auction starts and the desk is brought onto the floor, bidding begins, but you don't want to appear anxious, so you don't start bidding right away, as other bids come in, you start raising your number, your adrenaline starts pumping and your heart beats faster as the thought of losing *your* desk creeps into your head. You can't let that happen, so you continue to bid until you hear, "Going once, twice ... Sold!" You can finally rest knowing that you're going home with the desk you saw only an hour earlier and priced in your own mind at \$800 less than you just agreed to pay. Almost everyone is vulnerable to this in some form, and if you think you haven't been previously affected by it, think again. The reality is that opportunities seem more valuable to us when they are less available. The thought of losing something will motivate an individual much more than the thought of gaining something of equal value, which provides you with an opportunity to harness the threat of potential loss in a negotiation.

Imagine a situation where your client has run out of patience with the litigation and you have a trial date quickly looming ahead, yet your adversary refuses to engage in any genuine settlement discussions with you. One means of addressing this situation is to make an offer or demand available only for a limited time period before it is revoked. The party on the receiving end of this demand or offer is likely to perceive the figure to be better than they normally would because of its limited availability. This should not be surprising knowing that individuals generally perceive things which are difficult to get as typically better than those that are easy to get. Furthermore, by increasing the scarcity of the offer or demand in this fashion, the recipient will react by wanting and trying to decide and respond to the figure within the parameters you've set. They understand that to do otherwise might lead to a loss and as we've explored already, the threat of this loss alone can and often will make people act when they otherwise might not. Caution is recommended in that this practice should be used only sparingly and when utilized must be carried out to its fullest. If you set repeated time limitations within the same negotiation, it will clearly not carry the same weight and effect as the first time you impose this constraint. Similarly, you must act consistently with your ultimatum by revoking the offer or demand when you said you will, otherwise, you will not only lose ground within the negotiation, but more importantly, lose credibility in this and future negotiations with your adversary.

### **Ready Or Not, Here I Come**

The next time you find yourself thinking, "I'm done asking nicely", reflect on some of these ways to exert influence to persuade the other side to reconsider your request:

1. Allow for a series of small reciprocal concessions and counteroffers that will result in the final dollar figure that is being sought;
2. Consider the stream of Costco food samples or the plight of the Krishnas and think of a "flower" that you can give today that will lead to a reciprocated *gift* tomorrow;
3. Create the opportunity for another to take a position in line with yours, no matter how small, and then reap the benefits when they feel the need to act consistently with that position even after you have increased the stakes to your advantage;
4. Create ways for people to connect with you and your client by finding similarities and familiarity throughout the litigation process, thereby increasing your appeal to

the other side; and

5. Finally, bear in mind that losses weigh heavier than gains psychologically and by creating a sense of scarcity when it comes to the availability of an offer or demand, you can make others act and react when they otherwise might not.

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## Kluwer Arbitration Practice Plus

Offers an enhanced **Arbitrator Tool** with 4,100+ data-driven Arbitrator Profiles and a new **Relationship Indicator** exploring relationships of 12,500+ arbitration practitioners and experts

The image shows a promotional graphic for Kluwer Arbitration Practice Plus. On the left, there is a blue background with the text 'Kluwer Arbitration Practice Plus' and a description of the tool. On the right, there is a screenshot of the software interface. The interface has a blue header with a checkmark icon and the text 'Explore Practice Plus'. Below the header, there is a profile card for 'Gary S. Barr' with a photo and some statistics. To the right of the profile card is a 'Relationship Indicator' dashboard featuring three donut charts and various data points. At the bottom of the graphic, there is a dark blue bar with the 'Kluwer Arbitration' logo on the left and the 'Wolters Kluwer' logo on the right.

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