Kluwer Mediation Blog

Offers in Mediation, Busting the Myths

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Offers in mediation are too often approached with all the coyness of gauche teenagers at a school dance (acknowledging that this metaphor may reveal too much about my own youth!). It need not be like this. Here are some thoughts to ease the pain.

1. **Going first is not weakness.**

All mediations require offers to be made, it is an expected and normal part of the process. Making the first offer is not weak, it is simply part of what you are there for. If anything, a reluctance to make offers runs a greater risk of appearing "weak", because it suggests either a lack of preparation, or a lack of confidence. After all, if on your risk analysis the case is in fact worth X, then making an offer which at least heads meaningfully in that direction is common sense.

2. **Where to start?**

This has a lot to do with credibility. Parties are often tempted to start with highly cautious offers, and then consider a more significant move much later on. I have often found this to be problematic for them. The reason is that if they spend many hours of mediation justifying small moves, and then make a large move much later, the recipient is very likely to think that:
– their earlier offers were simply a poor use of the process, and perhaps somewhat offensive, or at best a waste of time; and
– their later protestations about not wanting to move up from their much-improved offer will be treated with equal scepticism.

By contrast, I have generally found that parties benefit from making some sort of significant move in their early offers (assuming there are significant moves to be made, which of course there may not be). In doing so they establish credibility and seriousness, build goodwill and put pressure on the other party to do likewise (likely to be evidenced by the mediator spending a good deal of time with the other party). I acknowledge that this approach contains some risk (as do *all* meaningful settlement discussions, incidentally) but it also contains the scope for considerable upside. It requires the courage to lead by example.

3. **Offers usually beget offers.**

Offers usually lead to counter-offers. Part of the job of an offer is to influence the counter-offer. So an overly cautious or aggressive offer (especially if it is a first offer) will likely produce something similar in response. Unless that is what you want, it pays to think carefully about the response your offer seeks to elicit.

4. **Offers don't have to happen late.**

There is an apparent belief in the enhanced value of offers made after nightfall! Permit me to challenge this, for the sanity and well-being of all those involved in mediations. There is only a certain amount of goodwill "capital" to be spent in a mediation, and it makes no sense to waste it on unnecessary delay. All mediators are familiar with the exasperated cry "How can they be taking so long to come up with an offer?". The key is to do some serious thinking about offers *before* the mediation, but then be flexible enough to shape that thinking around what you learn *during* the mediation itself.

5. **Offers can happen too early.**

We all know the parties who turn up to mediation and say (in effect, though usually more politely) "forget the process, we are just here for offers". This can be a difficult call for a mediator. On the one hand, the temptation of quick progress is great. And it feels odd to be holding back the parties from making offers, when that it what they want to do. On the other hand, if all the parties do is turn up to make offers based on pre-determined thinking and positions, not to mention a host of as-yet-unchallenged assumptions, then the mediation is little more than a forum for the exchange of offers, and much of its value can be lost.

The reality is that there is a process to be gone through, and it requires more than lip service. Even for a party with no intention of exposing its *own* views to genuine discussion in a mediation (thankfully not common), substantive engagement with the issues, priorities and perceptions of the other party seems to me to be a necessary minimum in order to understand the context in which an offer will land, and the aspects which might prove more or less appealing to the recipient. Absent that, the chances of the offer landing well are much reduced. It's like target shooting in the dark.

In simple terms, therefore, even the right offer at the wrong time is the wrong offer. Give the process a chance.

6. **Rationale increases credibility.**

Someone making an offer can choose to present either:
– just the terms of the offer – eg "I offer X"; or
– the terms and some accompanying rationale – eg "I offer X because of Y factors or Z risk

analysis.

All mediators know that the first question you are asked when you bring an offer from one room into another is “How did they get to that figure/those terms?”. The answer “I haven’t been told” does little for the credibility of the offer. By contrast, an answer which displays a meaningful risk analysis or some other thinking behind the offer is immediately more credible. Furthermore, it focusses the recipients on the rationale behind the terms, not just the terms themselves. This means (at least implicitly) that to shift the offer the recipient will need to address the analysis. All this produces a much more thoughtful approach to settlement.

7. **Clarity is vital.**

An obvious point, I know, but a critical one nevertheless. Precisely what does an offer include/exclude? What about VAT? How wide are the releases of claims? And so on.

Language is part of clarity, especially clarity of tone. I have often found myself rehearsing with a party exactly how they want a proposal to be framed, so that both they and I have the reassurance that it is conveyed accurately not just in terms of content, but also of language and tone.

Even that process of rehearsing can throw up new points. For example, the throw-away line “…and tell them it’s our final offer” is often worth some interrogation. Is it really their final offer? Does that mean it’s not worth the other party responding with an offer which is close? Do they benefit from calling it their final offer, even if it is?

8. **Respect enhances the likelihood of acceptance.**

It can be hard for a party to accept an offer which is less attractive than they had hoped for, even if they see (or are advised of) the sense in it. Why make it harder for them to accept? Offers can be made in so many different ways, some of which are highly respectful and others less so. The latter simply reduce the prospects of acceptance, whilst the former increases them. So give serious thought to how to build respect into your offers, even if the terms themselves are unlikely to be well received. This can include the language used, and the choice of who makes the offer (eg party to party, lawyer to lawyer, via the mediator, and so on). On this latter point, I have sometimes felt that parties have missed a chance to convey their own offers by asking me to do so for them, perhaps out of an (incorrect) assumption that it has to be done that way, or perhaps out of a concern that they may not handle the situation well. Whilst such concerns are understandable, the consequence may be that they miss a chance for nuance, or to respond as the situation demands, or to “read the recipient”.

Building respect into offers can also include an acknowledgement of different perspectives, together with an explanation of why you can only compromise by X amount, recognising that the other party may find that hard to stomach.

9. **The benchmark.**

All this begs a question – what is the benchmark against which the wisdom of making a particular offer should be assessed? Or put another way, what constitutes a well-judged offer? This is not about making offers which are popular, or which please the other party. Indeed, central to this issue can be the capacity to make an *unpopular* offer in a way which maximises its prospects of acceptance. For me, a well-judged and well-conveyed offer is about two things:

1. Avoiding offers which *gratuitously* damage the prospects of settlement (the word “gratuitous” is important to reflect on – it’s perfectly acceptable to make an offer which the other party make not like, but is it “necessary” to a well-thought-through strategy, or merely “gratuitous”?); and
2. Making offers which transfer the pressure onto the other party, and with which they feel obliged to engage seriously (however much they may dislike the terms themselves).

Conclusion

Offers are a central component of all negotiations, including those in mediation. The judgment calls surrounding them demand serious thought. My plea is simply for that.

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