
Kluwer Mediation Blog

Move by Move in Mediation

Rick Weiler (Weiler ADR Inc.) · Friday, June 22nd, 2012

My work as a commercial mediator in Ontario Canada generally involves the resolution of money disputes. The process, most days, starts with a brief joint session during which the lawyers, and sometimes the clients, advocate for their perspective on the dispute. We then break to a caucus format and I become the shuttle diplomat usually conveying proposals and counterproposals and accompanying messages back and forth until the parties can find a number they can both live with on an all things considered basis.

I had an interesting case earlier this week (the subject matter isn't important for the points I wish to make here) and I thought you might be interested in the round by round bids. This was a capped value, win/lose case. In other words, at trial, one side or the other would win. The value of the case was a fixed amount and there would be no splitting the difference.

Round 1

Plaintiff (P): \$274,000 (all numbers shown are "all inclusive", meaning they include all claims, interest, costs, tax and disbursements)

Defendant (D): \$32,000

P started with a number that was clearly more than 100% of any reasonable evaluation of the case. D chose to respond with a "tit-for-tat" strategy, sending back a clearly unreasonably low number. Generally it is my practice in the early stages of a mediation not to push back when a number is proposed that seems to me unreasonable.

Round 2

P: \$243,000

D: \$35,000

P's second number, while a move of \$31K, was again more than 100% of the claim value. D, sensing that P hadn't got the message the first time again chose to respond with only a very small lift on their first number.

Round 3

P: \$220,000

D: \$56,000

P bid was now at the very high end of a reasonable assessment of the case. P threatened to end the mediation noting that they had moved over \$50,000 and D had only moved \$3,000. D responded with a move of \$21K but was still at a number at the very low end of the range for a reasonable assessment of the case.

Round 4

P: \$208,000

D: \$79,000

P moved \$12,000 while D jumped \$23,000. At this point D became impatient with the process and rather than continue with the tit-for-tat strategy made a larger move than they had in Round 3.

Round 5

P: \$196,000

D: \$91,000

P and D each move \$12,000 and express frustration that the other is not taking a realistic view of the case. We are still more than \$100,000 away from settlement.

Round 6

P: \$185,000

D: refused to counter

D expressed the view that this was hopeless and wanted to terminate the mediation. I suggested a “double-blind” mediator proposal process and D said it would consider my suggestion. I then met with P to explain the situation and make the same process suggestion. Both sides agreed to consider my proposal. My proposal was \$138,000 – the mid-point between the parties’ final numbers.

Both sides rejected my proposal although P told me I was close to a number they would take. At the same time, when D gave their negative response I asked what they were prepared to offer to settle the case. D confided in me that they were prepared to settle the case for \$110,000 if I could get the P to offer that figure. They told me they were not prepared to make that as an offer.

After further discussion I persuaded D to make an offer at \$110,000. My reasoning was that it would be a shame to miss a settlement if it was there to be had and that D wouldn’t know that unless it was prepared to expose the money it had brought to the mediation.

Round 7

P: \$161,500

D: \$110,000

P's further move, still \$23.5K more than the number I had proposed, was responded to with the same \$110,000 D had previously offered. P was very frustrated but by this time my mediator intuition told me to persevere. I encouraged P to reflect further and provide me with the lowest number they would accept.

Round 8

P: \$130,000

D: \$120,000

P dropped to what they called a “rock bottom” number and D responded with what they characterized as their final offer. Now I asked P to carefully reflect on the remaining gap and consider whether or not, “all things considered” that gap was worth the fight from this point forward. It was particularly important I considered to fully reflect on the value of finality, closure and certainty.

Round 9

P: \$123,500

D: \$120,000

P was now clearly trying to confirm that the stated final offer was really all that was available. D held firm.

Case settled at \$120,000.

Both sides were somewhat unhappy with the monetary result but I always think that's one of the hallmarks of a good settlement.

From a mediator's perspective I think this case demonstrates the need for and benefit of persistence even when a situation seems hopeless. The somewhat ragged progression of the negotiation process was, at times, frustrating to both sides but, in the end, did allow the P to satisfy itself that the “pipes were dry” and allowed D to test the money they had to settle the case.

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