

Kluwer Mediation Blog

The Transactional Mediation Approach: Dealing for Dollars

Jeffrey Krivis (First Mediation Corporation) · Tuesday, April 16th, 2013

This story is for you if ...

- The process of trading offers back and forth has failed;
- You want to settle but feel your only move is to threaten to walk out of the mediation.

Transaction bargaining is different than traditional bargaining, and provides more options to settle. Here's why:

The Traditional Negotiation Approach

Traditional bargainers, in the typical dollar dispute where for instance the plaintiff is seeking \$2m, typically the defense seeks a demand to settle which ends up being predictably outside the range of case value such as \$12m. This is done to give the plaintiff some bargaining room. Naturally the defendant is offended by such a demand as they see the case somewhere in the \$1-2m range so they offer \$75,000 'just to send a message'. There is now a huge gap in the initial positions, at least on paper, and it is the job of the mediator to help bridge that gap.

Some mediators will begin the process of exchanging offers and counter offers back and forth, until the parties are totally frustrated and the numbers continue to be far apart. The technique of serving as a messenger of numbers is a common role for a mediator. While it helps settle cases everyday, it often limits deal making. Why? Parties feel obliged to act in a way that is consistent with the numbers they present. That means that if a party provides a low ball offer because they are frustrated with the demand, they will behave in the typical way 'low ball' bargainers behave unless there is something done to change the dynamics of the game. The low ball/high demand approach leaves very limited options in a negotiation. The main option is a destructive approach known as the 'walk out'. Other options are to give a last and best offer, which is still low but presented with 'hope' that the other party will come alive and free fall into their territory.

The Transactional Negotiation Alternative

A good workaround in trying to move the ball forward during the middle of a mediation where a destructive traditional approach is brewing is what one author described as a 'simultaneous private negotiation' between the mediator and the parties in private rooms. The way it works is that when financial trade-offs are clearly resulting in limited movement, the parties will begin to negotiate a series of hypothetical moves directly with the mediator in a confidential way indicating what their actual expectations are for the negotiation. The moves could be handled in suggested ranges or

hypothetical numbers. The beauty of this approach is that the mediator maintains the confidentiality of the number exchange until s/he is in a position to make a recommendation of settlement. It's similar to an ongoing mediator proposal or double blind negotiation in which the parties are protected from vulnerability unless and until the case settles. For example, if Party A wants to settle for \$2m and Party B wants to settle for \$1-2m, but their last numbers are \$10m and \$500,000, by trusting the mediator with this method, the mediator will be in a position to diagnose precisely how far apart the parties actually are, despite the huge difference in their official positions. Based on this diagnosis, the mediator will be in a position to either recommend a range or specific number that will settle the case. This transactional or 'dealmaking' style is a common workaround after the parties have negotiated themselves into a corner and have no means of reengineering the numbers to get back in the game.

The Confidential Listener End Game

Another similar technique used toward the end of a mediation is the 'confidential listener' approach. What happens is that each party presents a confidential floating settlement number to the mediator that is their maximum number to settle the case. This has to occur when the traditional back and forth trading of numbers or brackets has failed. The mediator holds the offer in confidence unless it will settle the case. The structure allows for private testing of a settlement offer since only the mediator will know, and not disclose unless it settles the case. This process does not punish a party for being reasonable because the mediator will not disclose it since the same thing is being asked of the other party.

Both of these approaches can create some discomfort early in the negotiation because parties are accustomed to traditional trade offs. Indeed some companies actually require their negotiators to return a written summary that outlines each move and response. It is with this in mind that some element of back and forth bargaining is necessary allow for the real constituent decision makers to feel comfortable. The challenge is to keep the upset parties at the table long enough to work in a transactional and non-adversarial manner with the mediator such that they feel comfortable sharing their objectives. Provocative proposals carried back and forth accomplish the opposite objective because the parties feel an obligation to reciprocate and hit back.

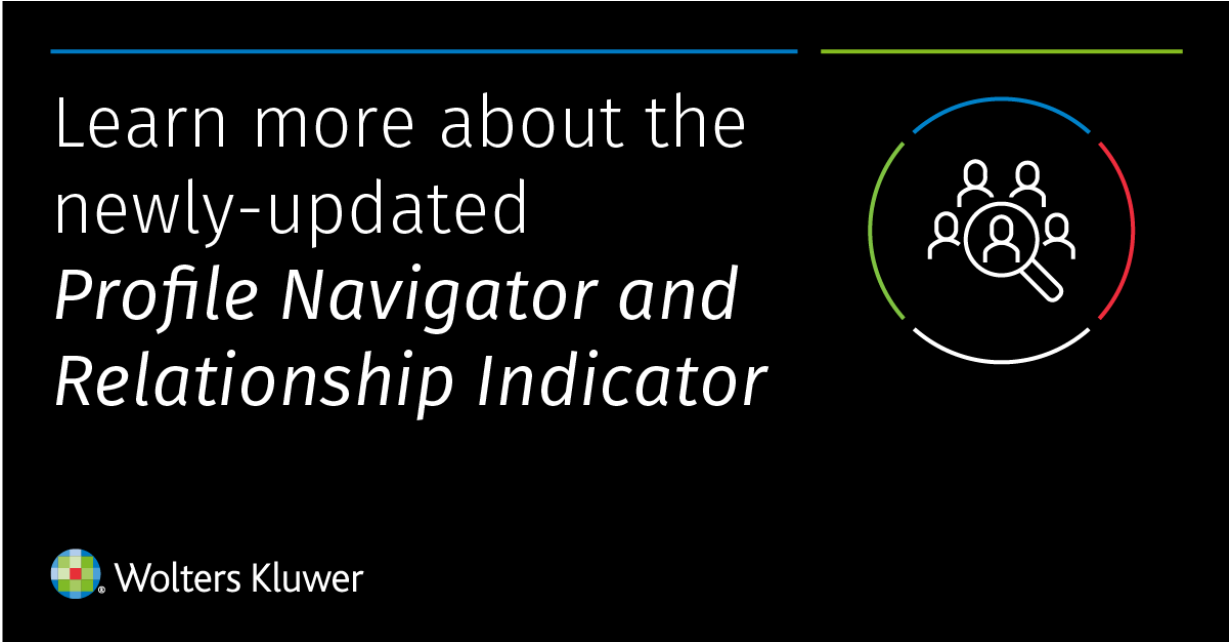
Many problems that arise in direct across the table negotiations are attributed to foolish excessive actions by one side or the other that throws a monkey wrench into the mix. Parties generally want to be forthcoming with their numbers when they trust the mediator and know their number will be protected. This takes a large investment of interpersonal capital between the mediator and the parties, and rarely happens in the first caucus. Yet, a willingness to approach the case in a transactional manner when dealing for dollars will move the ball down the field much faster than a conventional approach.

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