Kluwer Mediation Blog

Opening Offers in Mediation

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An article by Donalee Moulton in the January 24th issue of The Lawyers Weekly entitled, "Opening offers can make or break a deal" caught my attention and caused me to reflect on my own experience from approximately 3,000 mediations conducted over the past 22 years.

I urge readers to look a the Lawyers Weekly article as well as some of the other web resources on this topic including this posting by Matthew Rushton and this by the Hon. Jay C. Gandhi.

Much of the advice boils down to, "don't be afraid to make the first offer in mediation, so long as it's a reasonable offer, because by so doing you are anchoring the negotiation that follows and research shows that this "anchoring effect" will tilt the ultimate settlement number in your favour."

But is this always the case in mediation?

As regular readers know, most of my mediation work involves insurance-related disputes. In my experience the typical dynamic in money-only cases is a little different. The defendant insurer comes to the mediation with an upset limit on its authority which has been calculated based on their own internal risk assessment. This risk assessment is based on what is known about the case at that, sometimes very early, point. This is why it is usually helpful for plaintiff counsel to provide complete and ongoing disclosure of their client's medical condition well in advance of the mediation. If the medical support is there the defendant's risk assessment will be ratcheted higher coming into mediation.

When we get down to money at the mediation I often suggest to plaintiffs, in caucus, that there are really only two issues they need to focus on. The first is, "how much money is the defendant prepared to pay to settle this case today?". I tell plaintiff's I'll do my utmost as mediation to help them answer that question through the usual bid/counter bid process. At some point we will arrive at the defendant's apparent point of resistance in the negotiation. Inevitably a gap will remain between the parties' negotiation positions at that point and this leads to the second question: "all things considered, is the gap worth the fight from this point forward."

What do I say to defendants? First, I acknowledge that their money is the only "real money" in the negotiation that day, in the sense that it is present and available, as opposed to the plaintiff's "want to have" money. I suggest to defendants that I am there to give them the opportunity to learn if the money they have allocated to settle the case can get it done.

Agains this back drop comes the first exchange of offers. Oh, for the rational world where

plaintiffs and defendants would craft their first offers to be within the so-called “reasonable range”. Even better would be a world in which each side would routinely seek my guidance, or even approval, on their first offers. Alas, this is not the world I find myself in most days.

Rather, my experience is that the first offers are often a “continuation of the opening joint session by other means” (with apologies to von Clausewitz). Plaintiff offers are usually only a slight climb down from numbers in the Statement of Claim (and sometimes higher) – numbers usually well beyond the pale of a reasonable zone of settlement. Defendants generally believe that the only effective response is tit-for-tat and counter with an often manifestly ridiculous low offer. Just last week in a mediation I conducted a sky-high first demand was countered with a triple-bass low-low-ball that was about one-ninth of the eventual settlement number.

But the real point is that cases that begin this way ***routinely reach settlement***. Both sides know they are, in effect, negotiating with a net. An effective mediator is not simply going to throw up their hands and say, “well, I guess we’re finished. You’re too far apart.” No, an effective mediator is going to keep the parties at the table while normalizing the value-claiming behaviour and suggesting that it will be necessary for both sides to re-boot the negotiation so they will both be able to answer the above-noted questions they’ve come to answer. If the parties lack the creativity to reboot their own conversation then effective mediators will have ways and means of moving things forward such as conditional offers, soft offers, non-offers (“if I could get the other side to $X…?) and even early mediator proposals.

For me all of this is evidence of the organic nature of the mediation process both as it pertains to any individual mediation on a given day but also as the form of the process itself adapts, over time, to changing, increasing levels of consciousness. Effective repeat participants in mediation will be alive to that adaptation and their own behaviour in the mediation process will similarly evolve.

Again, in my experience, at the end of most days, what drives the settlement, what the mediator focusses on to bridge the inevitable gap, is a mutual recognition of the common interests of plaintiff and defendant: the need for finality and closure, the need to reduce or cap the costs, the need to maintain dignity and, perhaps most important, the need for certainty of outcome and elimination or risk.

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