THE OPENING DEMAND AT MEDIATION: HOW TO VIEW THE FIRST SHOT OVER THE BOW

"Or what king, going out to wage war against another kind, will not sit down first and consider whether he is able with ten thousand to oppose the one who comes against him with twenty thousand? If he cannot, then, while the other is still far away, he sends a delegation and asks for the terms of peace."
Luke 14:25-33

Assessing when and how to approach your adversary about mediating a claim presents a challenge to any of us representing a client in litigation. Even more challenging, I find, is determining what the initial demand should be. As a lawyer frequently representing the plaintiff in litigation, I feel the responsibility to not only provide the opposition with a clear statement of my client's case but also one that justifies considering settlement. You have to start someplace, and it is customary for me – as is usually the case – for the plaintiff to make the first bid – the initial demand for settlement. I also customarily submit that number in an initial demand package, or if negotiations are focused on a mediation, in the mediation statement which I submit at least two weeks – and sometimes earlier – before the mediation takes place.

The question is what should that number be?

Let's talk strategy and let's also talk about how the client views the numbers. First of all, I certainly avoid giving the client a bottom line number before the mediation or even at the mediation -- or a number which I recommend be the "bottom line" for settlement. Negotiations can change the view about a case. That certainly is true about a mediation. Much can be learned during the day about the case which can change its value.

My San Francisco Bar colleague, Michael Carbone, a full time mediator who writes regularly on the topic of mediation, says this about concocting settlement demands and strategies: "Clients are

often fixated on what the bottom line should be. This approach is understandable, but should nevertheless be discouraged. A demand number, a target (or 'wish') number, and a walkaway number can all be discussed with clients, but with the caveat that one or more of these numbers may need to change during the course of the mediation." (M. Carbone, "Resolving It," Vo.l 1, No. 10, October 2010.)

So you have to remain flexible regarding the numbers during the mediation.

But back to the initial demand. If it is too high, it invites resistance to negotiations by the opposition. If it is too low, then, of course, you are essentially bargaining below where you should be to drive the case value to an acceptable settlement point. The initial demand has to leave room for negotiation. We all know it is to get the process started, and is not the number that is expected to be the final settlement number. Similarly, the defense is not expected to put its "last, best and final" number on the table in its first offer.

Here are some thoughts on how to structure that first shot.

• What are the economics of the case? Have you presented a strong case and support for the damages to be claimed at trial? Are there soft spots?
• How does the opposition negotiate? Are they hardnosed or cooperative? Will they listen to the mediator? Is every first demand from a plaintiff considered unreasonable, or are they likely to respond to an invitation to bargain?
• Does your case have aggravated liability facts which adds potential to the outcome?
• Do you need lots of negotiating room?
• Is there an expectation that the plaintiff will show considerable movement during the negotiations?
• Who is the mediator and what his the approach likely to be taken by the neutral? No matter what the initial demand and offer, will the mediator work to get the parties into the "field of play" (aka: the reasonable negotiating range)?

In determining that first demand, first look at the hard economic damages which are likely to be viewed as clearly related to the wrongdoing. Second, if there are soft numbers in addition, which may be questionable or have less evidentiary support, they still should be cranked into the demand to provide negotiating room. Third, in a personal injury case, the claims for future medical expenses, and also impairment to earning capacity should be quantified and supported. Fourth, you have to obviously evaluate the potential for general damages, past and future..

Often I have jury verdicts research done to try to find comparable cases with verdicts that can serve as a basis for evaluation. Once I pencil out these numbers, I then place a value on the case using a range of a low result, mid result and very good result. After that I decide what additional sum I need to add to this number to negotiate given the factors outlined above. Maybe I need to add 30-50% to give me negotiating room, possibly even more if I think the other side is going to expect more give than take on the plaintiff's side.

I also need to dispel the notion that the settlement number is mid point between the initial demand and $0, which sometimes suspect is the perception of the defense. That is rarely the situation from my perspective.

The point is that the first demand must have a rational basis in light of the potential damages claims, so outlining those claims first is critical. They have to appear solid, and not unreasonable or if potentially unreasonable, perhaps just above the line of reasonableness.

The defense will likely advise the mediator that the initial demand as way too high in any event (of course it is high, but it is designed to start the bargaining process), so giving yourself some room to come down without compromising your ability to negotiate is important. Remember, you can always go down, but not up! So, if you going to err, be it an err that is high, not low!

Until next time, GOOD MEDIATING. . . .