AAA Brown Bag Lunch – October 14, 2019

Contributing and Creating Value in Mediation – Settlement Building Segment

What Are *Effective* Techniques that Work to Get the Negotiation Started, Advance the Ball and Keep it Rolling Forward?

by

Rebecca Callahan

"Ready for your first lesson in conflict resolution?"

1. Introduction

Facilitating dialogue about settlement is one of the many important services mediators perform, especially since prior to sitting down at mediation, the disputing parties frequently have not been talking at all - at least not constructively! Facilitating settlement dialogue is a job that can be shared with the disputing parties' counsel.

This article starts midstream in the process – *after* the mediation has been convened, everyone needed is in attendance, the session has been opened, the parties and counsel have settled in, and some level of discussion about the dispute has occurred. We are not at impasse. We are starting the negotiation phase and are looking at techniques that might help get the negotiation ball rolling or keep it rolling forward once a negotiation dialogue has started.

2. *Anchor Settlement*

The **anchoring effect** is a cognitive bias that describes the common human tendency to gravitate to the first piece of information and thereafter influences subsequent judgments. While in scholarly journals and negotiation skills training it is typically discussed in connection with distributive bargaining and money negotiations, I would submit that the mediator can use the anchoring effect to influence how the parties and counsel view and participate in the mediation – and can do so quite subliminally. As is true in the distributive bargaining scenario, once the **settlement anchor** is dropped, subsequent judgments are made by adjusting around that anchor. The opportunity the mediator has by anchoring settlement early is that it thereafter invites a natural bias toward interpreting the information and offer exchange through the lens of settlement versus advocacy. It encourages constructive thought about settlement and how to achieve a negotiated resolution or at least start the ball rolling in that direction.

The basic building blocks of the mediation process are:

- ***Convening*** – getting everyone committed to explore settlement through mediation
- ***Opening*** – the initial session(s) on mediation day
- ***Communicating*** – giving everyone an opportunity to tell their version of the story / listening / carrying messages / talking about BATNA and WATNA / etc.
- ***Negotiating*** – carrying offers and counter-offers / helping the parties assess offers on the table / helping parties respond / counter / etc.
- ***Closing*** – confirmatory acts when there's a deal / "impasse breaking" techniques when there's no deal

A great deal of emphasis is placed on these initial stages – the suggestion being that these 3 things must occur before a meaningful negotiation can be had – thus relegating negotiation to a secondary status in terms of chronological priority.

Similarly, a great deal of emphasis is placed at the back-end of the process and on the mediator's role in helping the parties break impasse if they parties get stuck – almost anticipating or foretelling that event

It will pay dividends if you anchor settlement early and often, starting with convening, including it in your opening remarks, and encouraging parties to include in discussions about the dispute how it might be settled, what value and benefits there might be in a resolution of the dispute (versus continuing with the litigation) and what they are looking for in a settlement, etc. The aim here is to avoid the pregnant pause that frequently occurs when moving from story-telling into negotiation.

A. Convening Letter – Set the Anchor

Opening Paragraph:

This letter will confirm that we are getting together for a mediation on Tuesday – May 22, 2018 at 10:00 a.m. at my offices, located at the above address. The purpose of the mediation is to explore a ***negotiated resolution*** of the disputes involved in the above-referenced matter. I look forward to meeting and working with you and your respective clients towards that end.

Closing Paragraphs:

The goal of mediation is to ***arrive at a settlement***. I encourage you to give some advance thought with respect to what type of documentation might be necessary or appropriate in this case. If you have a ***settlement agreement template and/or language*** that you typically like to use, you might want to: **1.** include those items with the exchange of your mediation statements, and **2.** bring a hard copy and electronic version to the mediation.

Your courtesy and ***cooperation*** is greatly appreciated in having this matter scheduled. I look forward to meeting with you and your respective clients next month, and hope that we can achieve a ***negotiated resolution*** in the above-referenced matters at that time.

B. Opening Statement – Re-Set the Anchor

Sample Opening Remarks:

Welcome everyone. We're here today to talk about how the disputes that led to the current lawsuit might be ***settled and resolved*** without further litigation in the courts…..

This dispute is settleable. Based upon what you've told me in your briefs, there is nothing about this dispute that makes it un-settleable. In fact, it is the type of dispute that routinely settles before going to trial. You have an opportunity today to take a serious look at settlement as a viable / preferable alternative to what awaits you in the court….

When we meet privately, one of the things I will want to discuss with both of you is what your thoughts are on ***how this dispute might be settled***; what framework or frameworks might be acceptable to both of you; where do you think would be a constructive place to start our settlement discussions; what do you think needs to be included in ***our discussions about settlement***, etc….

C. During the Mediation – Return Focus to Settlement

Sample Return Phrases:

- While there are serious differences of opinion and perspective, let's spend a moment talking about how you / your client might use today's mediation to achieve a negotiated outcome.

- Let me help you make the most of the opportunity presented today to try to achieve a negotiated outcome. Let's return our focus to how best formulate / make your next move.

- How does that [argument / demand] help achieve your client's negotiating objectives in this matter? What message are you intending to send to the other side?

- I accept your argument, and it's a very good one. Unfortunately, the other side has not been persuaded to yield that point. Putting arguments about the merits of the dispute aside, what are your / your client's negotiating objectives in this matter? What are your thoughts / what is your plan on how to get there?

- If you make that offer / proposal, what do you think it communicates to the other side? What are you expecting from the other side in terms of a counter-proposal, concession or demand?

- Let's talk for a moment about time and money. Have you assessed the value of settlement in terms of freeing up time and money that otherwise must be reserved for the litigation? (For plaintiff: Have you given consideration to what it would mean for you / your client to leave the mediation today knowing that he / she is going to receive a check for $_____ within the next two weeks?)

3. Getting the Ball Rolling

The purpose of mediation is to explore and hopefully achieve a negotiated resolution some or all of the disputing parties can live with and agree to at the mediation. It stands to reason that regardless of anyone's level of experience with mediation, everyone in the room knows in advance that **(1)** the reason for getting together is to try to settle the case, and **(2)** in order for that to happen, the parties need to engage in a settlement negotiation. Still, most parties and counsel come to mediation to advocate for their side of the dispute and have typically given very little thought to settlement beyond their respective opening move of starting aggressively "high" or "low." The following are some techniques that I have used that seem to help get the ball rolling and moving in the right direction in terms of inviting / encouraging constructive settlement dialogue:

A. Who Goes First?

In an A-B dispute,[1] it stands to reason that the complaining party should start the negotiations with the first demand at mediation. However, that logic does not always hold true because, after all, the complaining party has usually stated a number or at least a number range in his / her / its complaint. Obviously that demand was unacceptable because the parties are at mediation. The point here is that there is a **negotiation** that can be had over "who goes first?" Does the complaining party see a strategic advantage in going first and moving off his / her / its original demand number so as to signal to the other side that they are there in earnest to explore settlement? Does the responding party see a strategic advantage in going first in order to set a low anchor that they hope will influence the ultimate outcome of the negotiations, and to perhaps signal to everyone that they intend to engage in an aggressive negotiation scenario, meaning one that will **(a)** take time, and **(b)** require several moves / offers and counter-offers before a final settlement number is agreed upon?

In answering the question "who goes first," it matters whether the parties have engaged in negotiations before coming to mediation.[2] If they have, then it matters where they left off. Who made the last offer? What was the other side's response? If the party receiving the last offer did not respond or rejected the offer without a counter or explanation, that would seem to be the logical place to start the negotiation in terms of who goes first in the mediation. If during your pre-mediation telephone calls with counsel you learn that there have been no negotiations, it might serve to help get things

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[1] Party A complains against Party B with no counterclaims.

[2] Thus, it is very important to ask for this information either in the pre-mediation briefing or telephone calls to counsel.

started to ask whether counsel thinks that making a pre-mediation offer might be to their client's strategic advantage or simply for purposes of getting the ball rolling if time is of the essence (e.g., the parties and counsel have committed to less than a full day of mediation and one or both parties is simply testing the water before jumping in).

B. Baby Steps & Negotiate the Framework

In more complicated matters where there are a lot of moving parts – multiple issues, multiple parties / insurers, claims and cross- or counter-claims - it is not entirely unreasonable for either side to be reluctant to put the first offer on the table or to be comfortable or confident about where the negotiations should start. The "first offer" may thus be a proposal about possible frameworks - without specific terms - to see if an agreement can be reached on what to negotiate about and in what order. This may invite competing framework proposals, but so what? The negotiation is nevertheless underway and parties are starting the hard work of drilling down on learning what it is going to take to achieve a negotiated resolution.

Negotiating the framework means that "the negotiation" will take more time, but it may be the only way there is any prospect of the parties achieving a settlement at mediation because it is a necessary first step. One nice thing about negotiating the framework is that it has the effect of demonstrating to the parties and their counsel that they are in control of both the process and the outcome, and nothing is going to happen that they do not agree to. Additionally, because this type of negotiation takes time, it allows for parties to make adjustments away from the negotiation goals and reservation points they may have defined before coming to mediation that have little or no prospect of being something the other side can or will agree to accept. It thus avoids, delays and/or minimizes impasse late in the game.

C. Coaching & Delta Analysis Roadmap

In a money negotiation, parties frequently come to mediation with a settlement goal in mind, but no plan on how to get there. Providing the parties and counsel with a delta analysis roadmap is a form of "Negotiation 101" coaching that we can do equally in both rooms, and which can help parties and their counsel **(a)** develop a realistic settlement goal, **(b)** visualize a plan on how to get there, **(c)** quantify the value of making / getting concessions along the way, and **(d)** engage in advocacy in the context of negotiation (versus adjudication).

In a **simple negotiation** where the parties are simply going to trade numbers, the chart put on the whiteboard is the same in both rooms and shows **(a)** here is where you

are, **(b)** here is where they are, and **(c)** here is the midpoint signaled by those two offers. *That* then invites the discussion about where is the party driving to? is that midpoint in the range where the party would be willing to settle? is that midpoint a number that is within striking range of the party's settlement goals? is that midpoint realistic in terms of it being a number that the other party can afford and can reasonably be expected to consider and/or accept? These steps and questions are repeated throughout the negotiation with added discussion about "reservation points" if necessary.[3]

	Party A.	Party B	
#1	$_____	$_____	#2
	What's the delta? #1 - #2 = $_____ (X) *What's the midpoint?* $X ÷ 2 = $_____		
#3	$_____	$_____	#4
	What's the delta? #3 - #4 = $_____ (X) *What's the midpoint?* $X ÷ 2 = $_____		
#5	$_____	$_____	#6
	What's the delta? #5 - #6 = $_____ (X) *What's the midpoint?* $X ÷ 2 = $_____		
#7	$_____	$_____	#8
	What's the delta? #7 - #8 = $_____ (X) *What's the midpoint?* $X ÷ 2 = $_____		
#9	$_____	$_____	#10
	What's the delta? #9 - #10 = $_____ (X) *What's the midpoint?* $X ÷ 2 = $_____		

Note: Even inexperienced and novice negotiators are quick learners in terms coming to understand the tit-for-tat / give-and-take that is part and parcel of a distributive bargaining negotiation – which most money negotiations are! It is also engaging and stays on the board while you are working in the other room.

[3] *See*, article attached as Exhibit 1.

In a **complex negotiation** where "the settlement number" is tied to a number of components and perhaps competing claims / cross-claims between the parties, the delta analysis takes a different form. Using a hypothetical scenario involving an intra-partnership dispute:

Items		Party A	Party B	
▪ Damages from X for Party A	#1	$_____	$_____	#2
		What's the delta? #1 - #2 = $_____ (X)		
		What's the midpoint? $X ÷ 2 = $_____		
		Etc. thru steps 3, 4, 5, 6, …		
▪ Damages from Y for Party B	#1	$_____	$_____	#2
		What's the delta? #1 - #2 = $_____ (X)		
		What's the midpoint? $X ÷ 2 = $_____		
		Etc. thru steps 3, 4, 5, 6, …		
▪ Sale and division of proceeds from the sale of Property A	#1	$_____	$_____	#2
		What's the delta? #1 - #2 = $_____ (X)		
		What's the midpoint? $X ÷ 2 = $_____		
		Etc. thru steps 3, 4, 5, 6, …		
▪ Value and division of AR collections	#1	$_____	$_____	#2
		What's the delta? #1 - #2 = $_____ (X)		
		What's the midpoint? $X ÷ 2 = $_____		
		Etc. thru steps 3, 4, 5, 6, …		
▪ Prevailing party costs & attorney's fees to Party A	#1	$250,000	$ -0-	#2
Prevailing party costs & attorney's fees to Party B	#1	$ -0-	$250,000	#2

Visually, the delta analysis re competing attorney's fees claims should encourage the parties to focus their negotiation on the higher items.

There are many, many applications and hybrids for the delta analysis. I have been using it for about four years and have modified and continue to modify it depending upon the case and the negotiation that is underway. I continue to be surprised at how helpful it is for purposes of getting the ball rolling *and* avoiding or quickly navigating past impasse. As to the latter point, when impasse occurs late in the game, the delta analysis on the board helps the parties and counsel see just how much progress has been made. Sometimes that alone is enough to keep the parties working (countering). Even if they stop, it helps parties then talk about whether they need more time or information to consider the last offer, or what they each might be able to do to negotiate the gap at a future point in time (privately or in a return mediation).

D. Early Brackets

Mediators frequently have discussions with one or both parties about why they might want to give serious consideration to making the first offer so as to receive the benefits of the "anchoring" effect – namely, the influence the first offer has on the value of that which is under discussion. Significant research has been done that indicates that the first number proposed that is not absurdly high (from a defendant's point of view) or absurdly low (from a plaintiff's point of view), will set the zone of bargaining, and the final number will usually fall mid-way between the two "reasonable" extremes. Stated another way, once an anchor is dropped, subsequent judgments are made by adjusting around that anchor, and there is a natural bias toward interpreting other information through the lens of that original bid or ask. A deliberate (i.e., thought out) starting point can affect the range of possible counter-offers and, thus, define the bargaining zone.[4] Moreover, research shows that in situations of great ambiguity, complexity and/or uncertainty, the anchoring effect is even stronger in terms of the influence it has on the rest of the negotiation.[5]

Mediation is a concentrated dispute resolution process where the resolution of a dispute that would take months or years to n the courts or an arbitration takes (in most cases) a single day. In that day devoted to the mediation, everyone's focus, attention and energy is being directed at the dispute and its resolution through a negotiated effort. The interactive effort required in a mediation takes energy and brings Newton's Third Law

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[4] *See* "Step Out of the Zone of Comfort: Make a Reasonably Aggressive Settlement Offer in Mediation," by Lisa Amato (The Federal Lawyer, October/November 2016), copy attached as Exhibit 2.

[5] For more information on using anchoring to persuade a party to make the first move, *see* "The Advantages of Moving First in a Mediation," by the Honorable Jay C. Gandhi (Retired Magistrate Judge) (Daily Journal, Sep. 27, 2013), copy attached as Exhibit 3.

into play (and thus our consideration): namely, In every interaction, each action begets a reaction of equal force. If parties expend precious energy on wasted moves early on in the process (i.e., exchanging what they know to be insulting or unrealistic offers and demands), then they set the mediation up for at least fatigue later on in the process when focus and energy are most important and key to their ability to make decisions (especially those requiring consideration of new information and/or settlement terms different from what they planned for before coming to mediation). Against this backdrop, you might want to introduce the early discussion about brackets – not so much for the purpose of finding an agreed upon range (but you never know!), but to help both sides to start the negotiation in a reasonably aggressive range that eliminates spending time and effort exchanging "insulting" offers.

A bracket is simply a conditional offer that proposes that if the other side starts at "X," the offering party will start at "Y," with neither side agreeing to accept the other's number or even their own. The object of the exercise when used at impasse is to help the parties find and agree on a negotiating range to restart negotiations that have stalled because they both reached their reservation points.[6] Early in the negotiations, the bracketing discussion is used to encourage a reasonable open and a reasonable counter usually after the initial exchange of uber insulting offers. The discussion might go something like the following:

> "Based upon the initial exchange of offers, it would appear that an aggressive negotiation is in play. Given the distance between the two initial offers, in all likelihood, it will take 20 more exchanges before either side will be able to assess whether a meaningful settlement offer exists today.
>
> Do you really need to go through 10 steps or would you like to try to see if the negotiation can be put on the fast track and maybe get everyone out of here by 6 PM instead of Midnight?
>
> Given where you've both started, I would guess that both sides' pre-defined reservation point (last-and-final offer numbers) is going to result in a gap. *[Draw a hypothetical on the white board per Exhibit 1.]*
>
> Do you want to talk about a bigger step you might be willing to make (up or down) if the other side was willing to commit to making significant step (up or down)?"

[6] *See* Exhibit 1.

If the answer to the final question is "yes," it doesn't really matter whether a bracket is found. If that party sticks to an aggressive negotiating plan with another unreasonably high or low offer, you can still have the "early bracket" discussion with the other side. The important point – for me – is to find a way to introduce the bracketing / reservation point concepts early on and in both rooms you can return to these topics later.

Brackets can be an effective negotiating tool / technique in the early stages of getting the negotiation started because, by exploring possible brackets (negotiation ranges), the parties are able to signal where they are heading without actually saying so. Brackets also communicate helpful information at the start about the parties' respective expectations – again, without them actually expressing those expectations in messages carried between the rooms by the mediator.[7]

4. Keeping the Ball Rolling – Negotiation in Progress

Frequently, much of what is said in the pre-mediation briefs and initial discussions once the mediation is opened concerns the perceived legal merits of the case – basically, each side arguing to the mediator why it believes it will win if the court is left to decide the outcome. Against this backdrop, it certainly looks like the parties and their counsel want an evaluative opinion from the mediator about who is "right" and who is "wrong," *and* want that "opinion" to be communicated and shared with the party who is "wrong" in an effort to persuade that party to accept the "right" party's offer as that which represents a reasonable and fair price for resolving the dispute. Any experienced mediator knows that expressing an opinion on the merits of the dispute raises several risks, including: **(1)** the "wrong" party (not perceiving itself to be wrong) might then question the mediator's impartiality and the legitimacy of the mediation, **(2)** once given, it might be that neither side likes the opinion and then do not have confidence to continue with the mediation with the opining mediator involved, and **(3)** depending on how the opinion is delivered, it might be perceived as coercion or duress aimed at forcing an unwilling party to agree to a contract it does not want.

That being said, mediators are not potted plants. They typically have decades of litigation, subject matter and mediation experience. It is thus unrealistic to expect that a mediator will not have some impression about the strengths, weaknesses, merits and demerits of a dispute and its likely outcome. This section discusses some ways in which mediators can coach the negotiation process along using both analytical and non-analytical input that falls short of expressing an opinion or directive while, at the same

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[7] *See* "Overcoming Impasse at Mediation: Bargaining with Brackets," by Michael D. Young and Marc E. Isserles (New York Law Journal, Feb. 8, 2016), copy attached as Exhibit 4.

time, helping to keep the ball rolling in a way that postures the mediator as friend to all and ally of none. Many of these techniques are equally available for use by the parties' counsel when working in joint session or attorney caucus.

A. Risk Analysis

Settlement building with analytical input that focuses on the litigation process – its inherent uncertainty, risks and costs – is a "difficult conversation," but it is the one that we are paid to initiate.

In the heat of litigation, most parties cannot perceive and maybe do not understand how litigation uncertainty plays out. *See* cartoon below:

The mediation is frequently the first opportunity the parties and their counsel may have had to push the pause button and consider whether the claims and position asserted are viable, what exposure is presented by the other sides defenses / counterclaims and asserted positions, and what a "win" or "loss" means in terms of sunk (unrecoverable) costs, and the value of a net-net outcome and what might potential exposure look like in terms of dollars and cents. Importantly, we the mediator are not just the messenger carrying the parties' respective messages, we are the "agent of reality" in terms of inserting our experience and understanding about the litigation process and the challenges presented to both parties due to whatever the particularities are of the given

dispute. The following are some tips for putting litigation uncertainty on the table for discussion (always important to be discussing, not telling).[8]

Burden of Proof Analysis

- Who has the burden of proof on what issues?

- What is that burden of proof?

- How – exactly – is burden of proof applied in action? *Demonstrate "preponderance of the evidence" – if the evidence is weighed as <u>even</u>, the plaintiff will lose.*

Conflict in the Evidence

- Do the parties agree that they are putting forth two opposite sets of facts that cannot mutually co-exist?

- How – exactly – do judges and juries resolve such conflict when making decisions?
  - credibility
  - corroborating or disputing third-party witnesses
  - corroborating or disputing documents
  - corroborating or disputing "JN" facts
  - importance of burden of proof / preponderance of the evidence

[8] In 2006, the Dispute Resolution Section of the ABA formed a task force to evaluate issues regarding the quality of mediation from the point of view of the consumer (outside and in-house counsel). The survey results showed that while 80% of the responders said that analytical input by the mediator was helpful, half of the responders did not like to be told what they should do, especially as pertained to the subject of whether or not they should accept a pending offer. *See* www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf.

Competing Legal Theories

- Is there a SCOTUS or Cal SC case that governs?
- Is there a split among the courts of appeal?
- Is it a novel issue – meaning no case precedent?
- Is it a fact driven legal issue? (Return to "burden of proof" and "conflict in the evidence")

Battle of the Experts

- Is the subject matter technical – will judge or jury understand the opinion? Be able to distinguish and manage the nuances on which opinions sometimes turn?
- Is the subject matter complex / voluminous – will judge or jury be able to follow sequentially or only pick up bits and pieces? *And* will they understand?
- Same "conflict in the evidence" issues – how does a judge or jury pick between competing opinions?

How much is all of this litigation going to cost? How much are you willing to pay to test principles / to throw the dice on being right?

- Attorney Fees?
- Expert Witness Fees – cost advances?
- Discovery – cost advances?
- IT Support for Trial – cost advances?
- Arbitrator / Room Rental Fees - cost advances?

Decision Error & the Kiser Study,[9] which offers empirical evidence that decisions about settlement / how to negotiate for settlement of the litigated case should <u>not</u> be based on the attorney's assessment of the judgment value of the case.

- "Judgment value" is suspect experientially because most litigated cases are resolved through settlement – not a judgment after trial

- "Judgment value" is suspect statistically because Kiser study shows that 81% of the time, the parties made a mistake – a decision error – by going to trial rather than accepting the last settlement offer that was on the table.

- It is a fallacy that anyone – attorney advocates, mediators *and* retired judges - can predict a litigation outcome. This is why including a careful "risk analysis" in your pre-mediation preparation will pay dividends during the mediation.

The "risk analysis" conversation is that which allows parties to make adjustments to their pre-mediation positions. To be effective, it must be handled delicately and the timing must be right. In most cases, having the "risk analysis" conversation at the front end of the negotiation is the wrong time! Better to use "risk analysis" later in the negotiation or after impasse.

B. Ask for Reasons

The best / most effective settlement dialogues are those where the parties tie reasons to their respective proposals; where they state what the facts, law, circumstances, reality factors, etc. are that underlie and are the basis for their proposal or their rejection of a proposal. This technique works <u>equally</u> around the table / in all rooms. First time through, it can be somewhat challenging to the party being asked to explain or justify its proposal, rejection of a proposal, counter-proposal, but it is this type of discussion that promotes constructive dialogue *about settlement* because the reasons given invite discussion and the sharing of information. The information that comes out with regard to the "reasons" discussion frequently is new information for the other side and sometimes even for the party's own lawyer.

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[9] *See*, "Advising Clients on the Value of a Case / Let's *Not* Make a Deal," by Susan M. Hammer (Oregon State Bar Bulletin, February /March 2009), copy attached as <u>Exhibit 5</u>.

Examples:

I understand that you find the other side's offer unacceptable, but can you give me some of the reasons why and, in turn, can you tell me what it is you think the other side should be offering? And what are you willing to counter and why?

Before I carry your offer to the other room, can you walk me through the components and how you justify your proposed number / terms? Because I'm sure the other side is going to ask.

In support of its offer, the other side has explained "X," what do you think about that?

C. Non-Analytical Techniques

It can be challenging to be persistent but not pushy, engaging but not off-putting, forceful but not controlling, etc. Blending *non*-analytical techniques with analytical ones can help.

Visuals

They say that a picture is worth a thousand words. Using pictures, graphs, charts and diagrams are a very effective and efficient means of advancing the discussion from talking about the problem to talking about the solution.

Examples:

A jointly created spreadsheet that charts and compares different settlement scenarios based upon the parties' respective proposals and counter-proposals gets everyone working and contributing towards the same thing. It also captures and uses shared information, and facilitates having everyone look at the same thing at the same time.[10] *Handout.*

A chart or diagram can communicate "reality" in a way that might be more easily understood and thus incorporated into the discussion about how to solve "the problem." [11] *Handout*.

[10] *See*, chart attached as Exhibit 6.

[11] *See*, chart attached as Exhibit 7.

Silence

A moment of silence can be effective because, for one thing, it allows parties' brains to catch up. When parties have to make seismic shifts away from their pre-mediation positions and are called upon to do so during the heat of a negotiation, there may come a time when silence or taking a break is what is necessary to keep the negotiations moving forward.

"Yes and…."

There is a fun little exercise that Jeff Krivis designed to demonstrate how using the words "yes and" keeps the discussion moving down the same path as the speaker's original thought, whereas using the words "yes but" takes the discussion in a different direction. Our tendency is to interject with "yes but." However, if our goal is to help the parties figure the answer out on their own, "yes and" is more facilitative in terms of moving the discussion / speaker's thoughts forward. This is especially important when using "brainstorming" and "ask for reasons," discussed above.

Candid Discussion

This is simply asking the parties – putting aside all the legal mumbo jumbo – what it is that they want or hope to accomplish via a settlement today so as to avoid the risk and expense of litigation tomorrow. For example, "What is it you really want or need?" This is not analytical because there is no substantive content in the question that is interjected by the mediator.

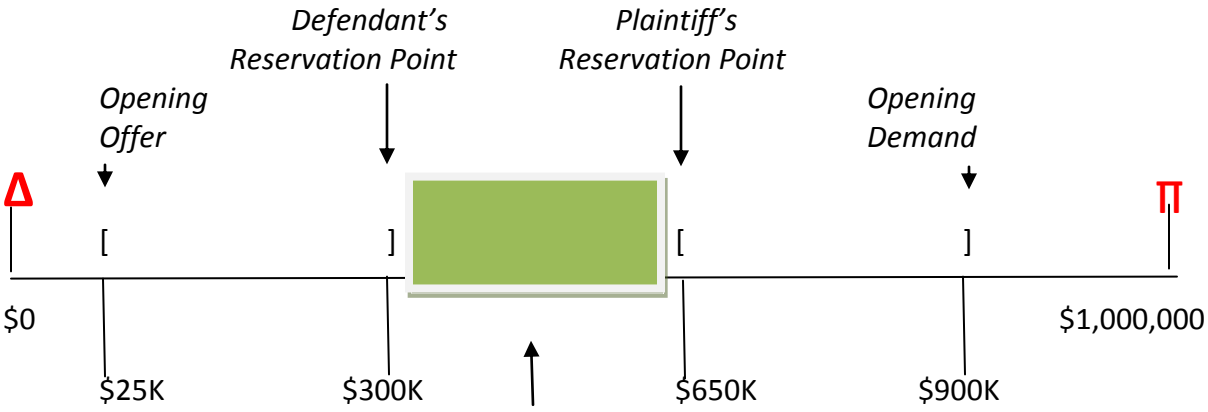
Redirect the Discussion

When parties get stuck in an unhealthy spiral, redirecting the discussion to another place might be what's necessary to keep the discussions going and avoid impasse. This is a close-cousin to "silence" and "take a break," discussed above. For example, "If you don't mind, I'd like to revisit "X" / talk about "Y" for a moment.

EXHIBIT 1

Reservation Points: A Perspective on Where the "Real" Negotiation Begins
By Rebecca Callahan

One goal of mediation is to get disputants to the point of having "problem-solving" discussions in the form of exchanging settlement offers. In the context of the litigated dispute where parties are represented by attorneys, the disputants usually come to mediation with a defined range of what they think constitutes a "reasonable settlement" and that range is usually determined by the attorney's analysis of what he/she predicts the judgment after trial will be discounted by some percentage. For example, plaintiff's counsel might say that the case is worth between $X and $Y based on prior experience taking such matters to trial and/or based upon research relating to jury verdicts, judgments and settlements of similar such cases, and may believe that the plaintiff has a "good" case defined as a 75% to 80% chance of winning. Defendant's counsel, on the other hand, might say that the defendant should prevail, but has a 20% to 25% chance of losing and estimates that potential liability could be between $A and $B based on prior experience taking such matters to trial and/or based upon research relating to jury verdicts, judgments and settlements of similar such cases. If you were to graph what the parties' pre-mediation ranges looked like, it would look something like the following:



This is where the "real" negotiation begins.

It is the rare case where parties' pre-defined settlement ranges overlap. As a result, settlements achieved during a mediation feel like and are perceived as "compromises" because the parties are required to move beyond their pre-defined reservation points. In the example above, defendant's reservation point was $300,000 as the most it would offer and plaintiff's reservation point was $650,000 as the least amount it would accept. It does not too much matter what the basis of each party's pre-defined reservation point is, the fact remains that their negotiation challenge is to stay at the table and negotiate within the gap between their respective reservation points. Some thoughts about points to be included in that "gap filling" discussion:

- There are numerous procedural hurdles that can be put in the path of both parties in the hopes of eliminating some or all of that party's claims or defenses, or significantly impairing the presentation of their case. All cases have them! Dispositive contingencies are part of each side's "worst case" analysis. These contingencies can be identified, evaluated and weighed and consideration given to the *risk avoided* by settlement.

- There are sometimes things external to the lawsuit that could affect the value of what is at issue, the finances or stability of one or both parties, etc. These contingencies are frequently the answer to "What could possibly go wrong?" Just like dispositive contingencies, these outside influences can be identified, evaluated and weighed and an adjustment made for the *risk avoided* by settlement. For example, the impact of avoiding fluctuations in the stock, financial or real estate markets; the impact of avoiding negative publicity about the lawsuit and adverse verdict; the impact of removing a contingent liability from a balance sheet.

- Other factors may be difficult to quantify but nevertheless have bearing upon the rational value of a case for purposes of settlement as compared with *possibly* obtaining a judgment in the future. For example: What is the judge's track record with respect to the efficient (or inefficient) management of a trial? Does the judge have a known predisposition with respect to summary judgment, jury voir dire, motions in limine, foundational issues, use of scientific information? Has the judge decided similar issues in other cases and, if so, which way did he/she rule? What is the experience or skill level of the attorney(s) on the other side? What is the population from which a jury will be pulled and what biases or prejudices might they, as a group, share in terms of how they might view / identify with or against the parties. And finally, the complete unknown as to who your jurors might be and the complete lack of control over what they do and how they decide a case. All of the foregoing are *risk factors*. When a risk is avoided through settlement, an is appropriate.

The above discussion points all focus on quantifying the value of *risk avoided*. We do not perceive or assess risk the same way, and much depends on whether we are facing a gain (selling) or a loss (buying). Generally speaking, in the context of a litigated dispute, plaintiff is selling its claim and defendant is buying plaintiff's claim. Studies show that the person selling places a higher value on that which is being sold than the person buying. Additionally, some people are more risk averse than others – meaning that they will pay more or take less in order to avoid the risk of loss/liability – and some people are risk seekers in the sense that what looks like an unwise gamble to most would look like a gamble worth taking to the person with an exceptionally high tolerance for risk. Risk attitudes of both the parties and their counsel are a

subliminal factor in any negotiation and exert strong cognitive influence on how settlement is viewed as compared to the high stakes and uncertainty associated with litigation.

Consider the recent decision in the Playboy whistle blower case brought by former senior vice president, Catherine Zulfer. In May 2015, Ms. Zulfer received a $6 million jury verdict under a 2002 federal law that protects whistleblowers. On top of that, the court awarded punitive damages. Playboy was represented by Sheppard Mullin, whom it sued for legal malpractice claiming that an attorney of ordinary skill and capacity would have advised it to settle the case and to demand that its insurer tender the $5 million policy limits. However, according to news reports, Sheppard Mullin very carefully evaluated the case, conducted research and analysis of prior verdicts and settlements, and even conducted a mock jury trial before providing Playboy with a valuation of the case. Based upon the information collected through these activities, Sheppard Mullin evaluated Playboy's "worst case" scenario as presenting an exposure well below policy limits and rated Playboy as having a 75% chance of prevailing on Ms. Zulfer's wrongful termination claim. What Playboy appears to have not factored in was the 25% chance of *not* prevailing, and the caution Sheppard Mullin most certainly gave its client that juries are unpredictable, especially with respect to their handling of emotional distress and punitive damages – both of which were awarded in this case. There are no reports of what was or was not offered or demanded in any pretrial negotiations between the parties, but it is probably safe to assume that Ms. Zulfer's opening demand was above policy limits and that Playboy's final offer was well below the $5 million policy.

Calling attention to the Playboy case is not intended to be critical of Playboy or its counsel[1] but, rather, to call attention to how much influence a defined reservation point may have on a party's perception and/or understanding of its downside risk and how that may in turn influence the party's attitude about and approach to settlement. It also shows the importance of reassessing the value of a case for purposes of settlement once the gap between the parties' respective reservation points has been reached – the assumption being that a settlement was attempted in the Playboy case and the parties got stuck around the policy limits figure (with Ms. Zulfer at or above policy limits and Playboy well below). Finally, it illustrates the importance of managing a client's expectations, and interjecting that management oversight periodically as the case develops.

When the reservation-point-gap is reached, the question at that point is not so much "Is this a good deal on the table that I should accept?" but "Will I regret not staying at the table and making a further effort to settle if the worst case turns out to be worse than estimated?" This is a very uncomfortable discussion to be had, for sure, but it is equally uncomfortable all around the table! Movement in this zone is both difficult and uncomfortable. However, in this changing climate where attorneys are being sued for "settlement malpractice" – both for recommending

[1] To the contrary, based on what has been reported concerning counsel's efforts to assess Playboy's potential exposure, it would appear that they appropriately told the client that there was risk and that they made a concerted effort to approximate the client's worst case based on the information then available in terms of prior judgments and verdicts.

or not recommending settlement – it is a discussion that needs to be had. This is especially true since a foundational underpinning of mediation is *party* self-determination, meaning that it is the party (not the attorney) who should to make the ultimate decision to or not to accept a settlement and thus take ownership of that decision.

EXHIBIT 2

Step Out of the Zone of Comfort: Make a Reasonably Aggressive Settlement Offer in Mediation

BY LISA A. AMATO

Let's state the obvious: mediation is a concentrated process in a continuation of negotiations. In a negotiation, parties that reach an agreement have succeeded in delicately engaging in and reasonably managing competitiveness and cooperation for the sole benefit of achieving their goals. Mediation provides a unique moment in the negotiation process where the attention of the parties and legal counsel are focused on the case without distraction.

When mediating business disputes, I see a critical opportunity that parties often fail to seize—the strategic advantage of anchoring the negotiation by making a "reasonably aggressive settlement offer." This opportunity exists regardless of which party made the last settlement offer or demand or when that last offer or demand was made.

A reasonably aggressive settlement offer is one that, as the name indicates, is both reasonable and aggressive. It should, of course, be based on relevant numbers specific to the facts of the case. A reasonably aggressive settlement offer should be structured based on the strength of all parties, BATNA (the best alternative to a negotiated agreement) and WATNA (the worst alternative to a negotiated agreement), the target at which the goals would be fulfilled (also known as the "aspiration base"), and the bottom line beyond which BATNA is triggered (also known as the "real base"). Thoughtful evaluation of the case allows a party to structure an initial settlement offer designed to test how much or how little the other party may be willing to accept.

The negotiation strategy of anchoring has been thoroughly analyzed and discussed as a psychological tool.[1] Studies have produced overwhelming evidence that there is much to gain by making a reasonably aggressive settlement offer as an initial offer. A reasonably aggressive settlement offer creates a strong pull throughout the negotiation to such an extent that it influences the other party's judgment even when that party desperately tries to discount it.[2] The reasonably aggressive settlement offer manages the other party's expectations and guides the terms of the ensuing settlement discussion. While the other party may dismiss the initial settlement offer, she will be forced to think within the parameters that have been set by it. In other words, a reasonably aggressive settlement offer anchors the settlement negotiations.

Time and again, parties in mediation often struggle with identifying their initial settlement offer that day, which is unfortunate because it is a wonderful opportunity to anchor the settlement negotiations in that party's interest. This opportunity exists regardless of whether the parties have been negotiating in advance of the mediation or whether one party has yet to respond to a party's initial settlement demand. The mediation process provides a prime opportunity for any party to set the stage for its best possible negotiated outcome regardless of the earlier negotiation strategies used.

An unreasonably aggressive settlement offer or demand not based on relevant numbers is not helpful to the negotiation. Unreasonably aggressive settlement offers tend to teeter toward absurdity. They cross a line of plausibility and trigger the other party to shut down the negotiations resulting in the loss of valuable time during the concentrated negotiation opportunity available in mediation. (This is not news to anyone.) That absurdly aggressive offer is a nonstarter, a negotiation killer. Unfortunately, all too often this scenario plays out in mediation regardless of how extensively the parties have been negotiating in advance of the mediation. Rather than a knee-jerk reaction to the other party's settlement offer for the sole purpose of "sending a message," a reasonably aggressive settlement offer based on relevant numbers, on the other hand, is far better suited to guide the negotiations on a successful trajectory.

Parties are often hesitant to make the first offer in mediation, and, when they do, they often make an offer that both parties know is not reasonable. Parties would be better suited to think more strategically about what is most likely to place them in the best position, and they should consider the use of a reasonably aggressive settlement offer. ⊙

Lisa Amato is a partner in the Portland, Ore., law firm Wyse Kadish LLP. Her civil litigation and mediation experience is the catalyst for her curiosity and studies of human behavior in negotiation. Her mediation practice is focused on business disputes and employment and general civil litigation. Amato can be reached at laa@wysekadish.com *or (503) 228-8448.*

Endnotes

[1]Adam D. Galinsky's studies and writings on the anchoring effect of numbers in negotiations are the foundation for anyone desiring more information about this negotiation strategy. *See* Adam D. Galinsky, *Should You Make the First Offer?,* Harv. Bus. Rev. Art. (July 1, 2004).

[2]"People tend to irrationally fixate on the first number put forth in a negotiation—the anchor—no matter how arbitrary it may be. Even when we know the anchor has limited relevance, we fail to sufficiently adjust our judgments away from it." PON staff, *Integrative Negotiation Examples: Effective Anchors as First Offers,* Harv. L. Sch. Program On Negotiation blog (Apr. 11, 2016), *available at* http://www.pon.harvard.edu/daily/negotiation-skills-daily/effective-anchors-as-first-offers.

EXHIBIT 3

LOS ANGELES
Daily Journal
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FRIDAY, SEPTEMBER 27, 2013

PERSPECTIVE

The advantages of moving first in a mediation

By Hon. Jay C. Gandhi

Often no one wants to make the first move at a mediation. It is a recurrent theme in many mediations and across the legal spectrum — business cases, intellectual property infringement suits, single plaintiff or class actions:

"You go first."

"No, you go first."

Why wait? Most people instinctively believe that they gain insight into the other side's bargaining position. It is a sneak preview, so to speak. But psychological research belies this conventional wisdom. Clinical studies demonstrate that a first-mover gains the following advantages in a negotiation: "anchoring," control and flexibility.

One of the more notable advantages is the "anchoring" effect of a first offer. The first number that enters the negotiation environment dramatically influences our value judgments. People have a tendency to use the value of the first offer to estimate the true value of an item or service up for negotiation and to adjust insufficiently from this anchor. And, a first offer maintains its strong gravitational pull throughout the negotiation process. As Adam Galinsky, a professor of management at Columbia Business School, pointed out in his study, "[e]ven when people know that a particular anchor should not influence their judgments, they are often incapable of resisting its influence" and "[a]s a result, they insufficiently adjust their valuations away from the anchor."

Now, most lawyers think that they would not fall victim to such mental inducement. "These are not the droids that you are looking for," to steal from Obi-Wan Kenobi. Yet, research shows that sophisticated parties are not immune from this human behavioral phenomenon. Let's turn to the research of Greg Northcraft and Margaret Neale. They researched the effects of perception and anchor points in the context of real estate negotiations.

Real estate agents, whom were experienced in pricing properties, were given identical information about properties and amenities. Yet, opening offers were selected at random from a group of four offers: $119,000, $129,000, $139,000 and $149,000. Agents studied the listing information and evaluated the properties after touring the homes for 20 minutes. Invariably, the real estate agents denied being influenced by the initial price, but those agents who received a greater initial offer gave the homes higher appraisals.

Most people instinctively believe that they gain insight into the other side's bargaining position. It is a sneak preview, so to speak. But psychological research belies this conventional wisdom.

In short, once an anchor is dropped, subsequent judgments are made by adjusting around that anchor, and there is a natural bias toward interpreting other information through the lens of that original bid or ask. Anecdotally, how many times in a mediation have you referenced where the plaintiff or defendant started? In this way, a deliberate starting point can affect the range of possible counteroffers and, thus, define the bargaining zone and the range of possible agreements.

First-mover advantages do not end there. Another advantage is to set the tone and control the discussion. Numbers send messages. One of the more important messages to communicate in the negotiation process is confidence. Those who lack confidence, due to an insecurity in their own pricing of the case, or unfamiliarity with the facts or the law, or some other reason, are typically disinclined to make a first offer. In so doing, they invite doubt into their positions. Calculating opponents often sense these vulnerabilities and attempt to take advantage of them. Unsurprisingly, the studies indicate that control and credibility ordinarily lead to better results in a negotiation.

A further advantage of moving first is flexibility. Settlement negotiations are dynamic, fluid processes. The first offer and the first counteroffer rarely resolve the matter. It's chess, not checkers. A reasonably aggressive offer from the start may provide leeway down the road for making concessions. And in settlement negotiations, sometimes one argument is the number and size of the concessions you "let"' an opponent extract from you; a sizeable move by one side may typically cause the other side to reciprocate, at least in some measure.

Granted, for every rule, there's an exception, or two or three, and here come a few of them. Not all first offers are created equal. Think Dr. Evil demanding one million dollars, and don't forget the pinky. The worst first offers are those that are far outside the reasonable bargaining zone. They are commonly ignored by the recipient or mirrored "tit for tat" in a counteroffer. Neither is productive. First offers should be carefully calibrated, and designed to draw out a solid counteroffer. Negotiators who aim too high on their optimal price risk regret. Without ever realizing it, they reject even the possibility of a profitable agreement. They do not even discover what could have been. Simple and well known, but too oft forgotten, it is more prudent to focus on a sound and sensible target price and make an aggressive offer, but be willing to compromise and still obtain a gainful deal, or at least learn that some type of deal is available, whether you ultimately accept or not.

Making the first move could be imprudent for other reasons. For instance, the psychological profile of your client may call that you wait for the first offer. Some people develop anxieties if mediations resolve too quickly, even if they get most of what they desired. These people might feel that they have been deceived in some way. In emotionally charged cases, which can include certain commercial litigation, some clients just need a long dance of blustering and bluffing for cathartic purposes. In these instances, the priority lies in keeping the settlement dialogue alive, as opposed to the exchange of specific dollar values.

In the end, and without further movie references, it is axiomatic that each negotiation should be tailored to the particular facts and parties of a case. Trite but true, never say never, and always avoid always. But the tactical benefits of making the first offer are plain indeed. You define the field. You control the process. You exhibit confidence. You proactively take charge of the negotiation. So, at your next mediation, you may want to rethink about shying away from making the first move. Perhaps, you should welcome that opportunity, and strive to capitalize on first-mover advantages.

Hon. Jay C. Gandhi *is a U.S. Magistrate Judge for the Central District of California and Vice-Chair of the Court's Alternative Dispute Resolution Committee.*

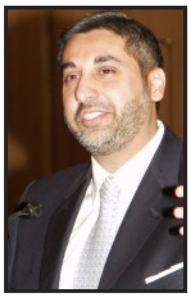

EXHIBIT 4

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Expert Analysis

Overcoming Impasse at Mediation: Bargaining with Brackets

By **Michael D. Young**

And **Marc E. Isserles**

Imagine this familiar mediation scenario: Plaintiff makes an initial demand of $2 million. Defendant counters with $50,000, to which plaintiff responds by moving to $1.6 million. Defendant then moves to $95,000, and plaintiff responds with $1.4 million. It is now 3 p.m. After six hours of negotiating, the parties are tired and frustrated and appear to be at an impasse.

Plaintiff thinks it has shown flexibility and a willingness to compromise, and is disappointed that defendant will not put "real money" on the table. Defendant, however, sees the negotiation quite differently. It thinks the $2 million demand was "completely unrealistic," and that plaintiff's movement to $1.4 million, which is still "way too high," shows only that plaintiff is "unwilling to accept reality." Defendant, after much prodding from the mediator, reluctantly agrees to move to $125,000 but says that, if plaintiff does not respond with a "legitimate number," the mediation is over. Upon hearing defendant's last move, plaintiff tells the mediator it is time to call it quits.

What can be done? The parties have told the mediator privately that they have significant room to negotiate; however, neither side is willing to make a significant move because of the perception that the other side has not moved far enough. And because the gap is so large, both sides believe it would be pointless to continue making small moves. The parties find themselves with a sizable gap yet seemingly no way to bridge it.

In this situation, the mediator might suggest a number of tools to help break the impasse. One of the most effective negotiation tools available to the mediator and the parties is a "bracket." A "bracket" is a conditional proposal in which a negotiator says: "We will go to X if you will go to Y." X and Y create a "bracket" between which the offering party proposes to limit negotiations.

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In the scenario laid out above, plaintiff could respond to defendant's last offer by saying, just by way of example: "We will come down to $800,000, if defendant agrees to go to $350,000." Defendant may choose to accept the proposed bracket, in which case the parties would negotiate within that range. More likely, defendant would offer a "counter-bracket" proposing a different negotiation range. For example, defendant might say: "We reject your bracket. But we will come up to $250,000 if you will come down to $400,000." Typically, when parties agree to bargain with brackets, they will trade proposed brackets and counter-brackets for at least several rounds of negotiation with the aim of moving closer to a mutually agreeable negotiation range.

> Brackets can help parties shift attention from disappointment with the other side's proposals and toward their own negotiating objectives.

Effective Tool

There are five reasons why bracketing is such an effective tool for breaking impasse.

1. Communicating Signals About Where a Party Is Heading. Proposals that take the form of an unconditional number typically provide very little information beyond the number itself. Limited to such proposals, the parties in our scenario lack a tool for communicating signals about where they might be heading and how far apart they actually are from each other. A bracket provides that tool.

By exchanging one round of brackets, our hypothetical parties have communicated, at a minimum, that plaintiff would accept $800,000 and defendant would pay $250,000. That might not be enough information to settle the case. But it is valuable information—which the parties might never have received without bracketing—that could break the logjam.

A bracket also communicates helpful information about the parties' expectations. Bargaining without brackets can involve a fair amount of guesswork. A party may think it is making a significant move but then learn its counterpart was expecting much more, leading to frustration and disappointment on both sides. However, when our plaintiff offers a bracket with a lower end of $350,000, it is clearly communicating: "We think $350,000, although not enough to settle the case, is a reasonable next move for defendant to make." That information helps defendant formulate an offer that will have predictable consequences—the closer defendant is to $350,000 on its next move, the more likely plaintiff will react positively. The same holds true for defendant's counter-bracket: it sends the message that plaintiff must come below $400,000 to be in what defendant regards as a "reasonable" settlement range. In this way, brackets help reduce the guesswork and resulting misunderstandings that can derail a mediation.

Finally, a bracket communicates useful data about the potential significance of a party's "midpoint." In our hypothetical, the midpoint of plaintiff's $800,000-$350,000 bracket is $575,000; the midpoint of defendant's $250,000-$400,000 bracket is $325,000. The party offering a bracket might be signaling a potential settlement at the midpoint. Sometimes parties say that expressly, for example: "The midpoint of our bracket is

meaningful." But the party offering a bracket may not be willing (at least not yet) to go to the midpoint, and so might deliver a very different message with the bracket: "Do not interpret this bracket as a signal that we will take (or offer) the midpoint; we won't!"

As with any message in a negotiation, statements about the midpoint should be taken with a grain of salt. Indeed, because bracketing is typically a multi-round process, the midpoints of the parties' brackets tend to move closer together over time. And regardless of what a party says about the midpoint's significance, it ultimately may be willing to go past the midpoint of an early bracket to get a deal done. At the same time, the midpoint of any given bracketed proposal remains a useful data point because it gives the recipient some idea of where the offering party might be prepared to go.

2. Shifting Focus. Brackets can help parties shift attention from disappointment with the other side's proposals and toward their own negotiating objectives. When parties fixate on the size of the other side's movement, they tend to get trapped in a vicious cycle of "tit for tat," reactive bidding in which the moves, and the chances for resolution, get increasingly smaller.

The exercise of constructing a bracket helps parties break free from that counterproductive dynamic and strike a positive, constructive tone. By offering a bracket, a party in effect says: "What really matters is not the size of the moves so far, but the number that can settle this case. Here is a bracket defining what we think is a reasonable negotiation range."

3. Encouraging Significant Moves. Because a bracket is a conditional ("if, then") proposal, it provides a kind of protection that tends to encourage "significant" moves. A party contemplating a significant, unconditional move will typically worry about what happens if the other side refuses to reciprocate with a significant move. It might be concerned about "running out of room," "signaling weakness," or having the number used against it (setting a "floor" or "ceiling") in future negotiations. These concerns, while valid, tend to eclipse all other considerations and limit a party to making small moves, which may not be the most effective strategy.

The conditional nature of a bracket allows parties to "test" or signal a significant move without actually making one. If a proposed bracket is rejected, the numbers in that bracket, at least formally, cannot later be used against the offering party. This provides a kind of "protection" that helps spur significant movement. By bracketing $800,000 with a demand that defendant come up to $350,000, plaintiff can signal a dramatic movement—dropping from $1.4 million to $800,000 in one move—without jeopardizing its bargaining position. The same holds true for defendant's counter-bracket: It allows defendant to signal a substantial move (doubling its offer from $125,000 to $250,000) without making a firm commitment to settle at that amount.

4. Generating Momentum. By encouraging significant moves, bracketing tends to create a positive negotiating atmosphere and the possibility of a "domino effect" of significant movement. Because brackets tend to represent significant movement, they tend to be interpreted as a signal that the offering party is "serious" about settlement. And although parties worry about making large moves that go unreciprocated, large moves frequently induce large moves by one's counterpart.

The conditional nature of a bracket allows parties to "test" or signal a significant move without actually making one. If a proposed bracket is rejected, the numbers in that bracket, at least formally, cannot later be used against the offering party. This provides a kind of "protection" that helps spur significant movement.

When our plaintiff proposes a bracket in which it offers to move all the way to $800,000 (albeit with a condition), defendant is likely to interpret that proposal as significant movement. That can trigger a reciprocal response from defendant, which is likely to be interpreted as significant by plaintiff. For example, even though our defendant rejected plaintiff's bracket, plaintiff is nonetheless likely to respond positively to a counter-bracket in which the bottom number is twice the amount of, and $125,000 more than, defendant's last unconditional offer. After trading a series of significant, bracketed moves like these, the parties would likely experience a sense of real progress and negotiating momentum that could be instrumental in settling the case.

5. Keeping Negotiators at the Table. Brackets work because they often keep parties negotiating until they are ready to signal or reveal their true bottom lines. Parties typically will not (and indeed should not) reveal their best numbers when a settlement seems out of reach. By the time our hypothetical mediation threatens to fall apart, it is probably too late in the day to continue to exchange unconditional numbers productively, yet far too early in the day for the parties to reveal to each other "best and final" numbers.

Bracketing works as a kind of bridge that helps carry negotiators far enough toward the other side, and far enough into the negotiating process, that they are prepared to reveal their cards and see whether resolution is possible. It serves the very practical function of keeping parties at the table when further bargaining seems, but is not in fact, hopeless.

Timing

A final word about timing. Parties sometimes express reluctance to use brackets "too soon." Because a bracket is neither a firm commitment from plaintiff to settle, nor "real money" from defendant, parties may not experience a sense of actual progress until they exchange a few rounds of unconditional numbers. However, we have also seen brackets used effectively during the early stages of negotiations that could not have otherwise gotten off the ground. In our view, it is never "too soon" to consider brackets—at least if the negotiation might end without them.

When is the right time to stop using brackets? After a certain point, an exchange of "if, then" brackets and counter-brackets can take on a kind of surreal quality, and one or both of the parties, or the mediator, might propose reverting to actual dollars. This usually happens when the parties have made enough progress narrowing the gap with brackets, and moving the midpoints of those brackets closer together, that they are optimistic about getting a deal done. Indeed, the very idea of shifting from brackets back to unconditional numbers is often a signal that brackets have done their job and carried the parties far enough along that they are prepared to make the final push toward settlement.

Conclusion

Mediation negotiations tend to bog down in familiar ways when limited to a traditional exchange of unconditional numbers. Bracketing is a highly effective negotiating tool for breaking that impasse. Brackets are not for everyone, and negotiators may have strategic reasons for deciding not to use them in a particular mediation. But we would encourage negotiators to consider the many upsides to bracketing before rejecting what is, in our view, an indispensable tool in the negotiator's, as well as the mediator's, toolbox.

EXHIBIT 5

Advising Clients on the Value of a Case

Let's *Not* Make a Deal

By Susan M. Hammer

Gettyimages

The settlement discussions concluded with plaintiff demanding $1.8 million, the defendant offering $1 million, and neither side willing to budge. The case went to trial, ending with a $1.4 million verdict and each side improving their position. According to a recent study published in the Journal of Empirical Legal Studies,[1] this was a relatively rare event.

In just 15 percent of all cases, both sides better their position at trial – that is, the plaintiff is awarded more than the defendant offered and the defendant paid less than the plaintiff demanded. In 85 percent of all cases that went to trial, one or both parties were worse off by rejecting the last settlement proposal.

This fascinating study included 2,054 California civil cases decided between 2002 and 2005. The purpose was to determine whether, and under what circumstances, the parties did better at trial than they could have with settlement. In 61 percent of all cases, plaintiffs did worse. On average, their decision error cost $43,000. The frequency of defendants' decision error rate was lower (24 percent), but the magnitude of error was greater. On average, getting it wrong cost defendants $1.1 million. These figures include awarded costs and attorneys fees.

Certain types of cases had higher settlement error rates. The researchers found that plaintiffs had higher decision error rates where contingency fee arrangements are common, such as medical malpractice cases (81 percent) and personal injury cases (53 percent). In contrast, plaintiffs' decision error rate in contract cases was 41 percent. On the defense side, decision error rates were highest in cases where insurance coverage is generally not available; for example, 44 percent in contract cases and 40 percent in fraud cases. Lower decision error rates were associated with cases where insurers were more likely to represent the defendant, such as premises liability (17.5 percent) and personal injury (26.3 percent).

Here's the kicker. The authors of this study have surveyed trial outcomes for the past 40 years. Even with availability of jury verdict information, the frequency of settlement (95 percent plus) and the attention given to risk analysis, decision error rates were *more* frequent in 2004 than in1964. Of course, this does not mean that our profession is getting it wrong in the 95 percent-plus cases that do settle. We simply have no basis for comparison in those cases.

Advising clients on the value of a case — when to hold 'em and when to fold 'em — is something lawyers do well every day. The study provides us with the opportunity to reflect on the reasons why cases do not settle and the costs and benefits associated with those decisions. Here are a few observations about how we might do better.

The Price to Pay

In the real world, settlement decisions are based on many factors other than economic efficiency. There are extrinsic factors that cause parties to sacrifice the optimal economic outcome in favor of a compelling, non-economic need. A party may put a premium on having his or her day in court, setting a precedent, sending a market signal, punishing or needing to "bet the company."

There is nothing inherently wrong with considering extrinsic factors so long as it is clear that pursuing them may come with a substantial price tag. Attorneys may have varying degrees of influence over client decisions, but at the very least, they can advise and hope their client will listen. I'd also suggest asking your mediator to help you work with a client who is having a hard time balancing the tradeoffs.

Manage Your Clients' Expectations

Lawyers need to work from day one on managing their clients' expectations. When plaintiff's counsel writes a demand letter that includes unrealistic theories and exaggerated numbers, and defense counsel responds, offended at the suggestion of liability and describing the claims as frivolous, there's a risk the client might take the lawyer's position literally. The client may not understand that aggressive advocacy is one thing and case evaluation another. When each side then writes a letter to the mediator giving an unrealistic settlement range, the client might come to mediation unwilling to consider a number outside it.

The plaintiff may first realize at mediation that their chance of getting a

Decision Errors and Cost of Error

	Percentage of Error	Mean Cost of Error		Percentage of Error	Mean Cost of Error
Overall			**Negligence (non-PI)**		
PL Error	61.2%	$43,100	PL Error	66%	$82,100
DEF Error	24.3%	$1,140,000	DEF Error	19.1%	$1,597,000
Eminent Domain			**Premises liability**		
PL Error	41.7%	$72,100	PL Error	68.7%	$46,100
DEF Error	33.3%	$523,600	DEF Error	17.5%	$2,378,000
Contract			**Intentional tort**		
PL Error	44.3%	$144,900	PL Error	69.3%	$43,400
DEF Error	44.3%	$1,528,700	DEF Error	21.2%	$859,400
Fraud			**Products Liability**		
PL Error	47.4%	$134,400	PL Error	71.7%	$72,600
DEF Error	40.4%	$4,086,200	DEF Error	17.0%	$1,327,300
Personal Injury			**Medical Malpractice**		
PL Error	53.2%	$32,200	PL Error	80.8%	$15,200
DEF Error	26.3%	$622,000	DEF Error	15.1%	$986,200
Employment					
PL Error	51.1%	$64,800			
DEF Error	32.4%	$1,417,700			

Journal of Empirical Studies, Volume 5, Issue 3, 551-591,September 2008 titled "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations by Randall L. Kiser, Martin A. Asher and Blakeley B. McShane. It can be found at http://www3.interscience.wiley.com/cgi-bin/fulltext/121400491/PDFSTART

$1million verdict is about 5 percent, and a defendant may hear, for the first time, that their chance of getting out on summary judgment is about 5 percent. The client may feel betrayed by the attorney ("whose side are you on?") and the lawyer may feel their client is being irrational. Attorneys can save their client relationships and have an easier time managing expectations if they use caution from the beginning, by talking about evidence that may surface during discovery or mediation that could change the risk assessment and by explaining the difference between an initial advocacy letter and a settlement analysis.

Vet Your Case to Someone Who has a Different Point of View

The most successful lawyers vet their case with seasoned practitioners in order to get a balanced view. When counsel seek out only like-thinking colleagues, they tend to get an overly optimistic view. It may be comforting in the short run but ultimately not helpful.

Give the Same Attention to Dispute Resolution Advocacy as to Trial Advocacy

Litigators go to CLE programs on deposition techniques, cross-examination techniques, offering evidence, voir dire and closing arguments. Although almost all cases will settle, attorneys generally have less training in dispute resolution advocacy. Some come to mediation and repeatedly present some version of their closing arguments. The best dispute resolution advocates come to mediation ready to learn something new and to thoughtfully analyze cost, risk, opportunity and non-economic factors. They are a counselor. Their clients are prepared to see their lawyers play a different role than they would at trial, and they are ready to appreciate it.

In 2014, this study will likely be done again. Will it show that, as a profession, we are helping our clients get better at knowing when and how we should "make a deal?" Time will tell. In the meantime, how can we counsel our clients to make the best decision possible?

Susan Hammer is a Portland-based mediator, focusing on business, employment, professional liability and injury cases. She has mediated for over 20 years. She is a distinguished fellow in the International Academy of Mediators and is listed in Oregon Super Lawyers and The Best Lawyers in America for Alternative Dispute Resolution.

Endnote

1. Journal of Empirical Studies, Volume 5, Issue 3, 551-591, September 2008, titled "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations" by Randall L. Kiser, Martin A. Asher and Blakeley B. McShane. It can be found at *www3.interscience.wiley.com/cgi-bin/fulltext/121400491/pdfstart.*

EXHIBIT 6

VISUAL AID EXAMPLE NO. 1

This case involved a dispute between the Assignment-for-Benefit-of-Creditors Estate and Newco, the entity that purchased substantially all assets of Oldco, concerning ownership of an unscheduled asset: namely, a class action recovery that was potentially worth as much as $15 million.

The parties had spent a fair amount of money on the litigation and both agreed that the class action recovery was probably worth at least $1.5 million. And both were willing to split that recovery 50/50 to reimburse themselves for their out-of-pocket legal expenses.

Where they got stuck was on how to divide any recovery in excess of $1.5 million. And they had traded various proposals based simply on how to divide up anything over $1.5 million.

What helped them work through impasse was division of the potential recovery into tranches. They then exchanged a first round of proposals – set forth below – and that helped them see that they weren't that far apart.

The then put an Excel sheet up on a screen and fiddled with percentages and additional tranches and worked everything out, but it was the first visual that got them going.

	NEWCO PROPOSAL				**OLDCO ESTATE PROPOSAL**			
	Newco		**Estate**		**Newco**		**Estate**	
	%	Amount	%	Amount	%	Amount	%	Amount
$0 to $1.5 Million	50%	750,000	50%	750,000	50%	750,000	50%	750,000
$1.5 to $4.5 Million	70%	2,100,000	30%	900,000	25%	750,000	75%	2,250,000
$4.5 to $7.5 Million	60%	1,800,000	40%	1,200,000	45%	1,350,000	55%	1,650,000
$7.5 to $10.5 Million	50%	1,500,000	50%	1,500,000	60%	1,500,000	40%	1,500,000
$10.5 to $15 Million	60%	2,700,000	40%	1,800,000	70%	3,150,000	30%	1,350,000
		8,850,000		6,150,000		7,500,000		7,500,000

EXHIBIT 7

VISUAL AID EXAMPLE NO. 2

This case involved a dispute between three siblings over the division of Mom's estate after she died. With the exception of sentimental objects, the only asset with any value was Mom's house. The eldest daughter had been Mom's caretaker for the last 5 years of her life and had lived in the house with her. She of course wanted to continue living there, but did not have the financial means to cash out her brother or sister. The brother was a man of means. The youngest sister was semi-retired and living on a fixed income. Much of the mediation involved a lot of venting about what the other had or had not done to take care of the house, to take care of Mom, etc. Ultimately, their collective reality was that they needed to move to the present and talk about how to divide an asset that was not easily divisible into three equal parts, as provided in Mom's will.

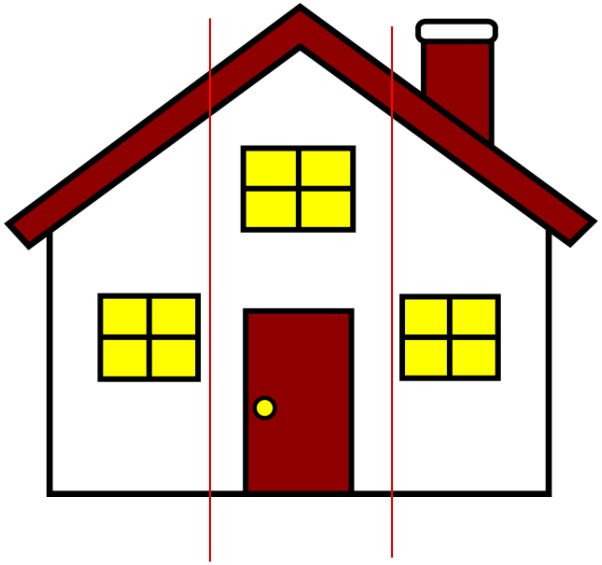
Bank Account w/$600,000

Sister #1 / $200K

Sister #2 / $200K

Brother / $200K

House Worth $600,000



How do you divide a house into 3 equal parts in a way that makes any sense?