



MEDIATION TIPS: BIDDING AGAINST YOURSELF—FOR FUN AND PROFIT

By Martin Quinn, Esq.

Without a doubt, the words mediators most often hear from counsel are “I won’t bid against myself.” This phrase is engraved as immutable law in the hearts and minds of virtually all counsel who come to mediation. By this, they mean that they will not make another negotiating move unless their opponent responds to their last move. As a general negotiating tactic, it usually makes sense. Negotiation is a conversation, which should normally be reciprocal. Neither side gives way without getting something in return from the other side. But negotiating settlements in complex lawsuits is not the same as buying a rug in a Middle Eastern souq. Counsel need to be more flexible, more creative and more willing to break “rules” to reach their client’s goal. And yes, in a few instances, a creative negotiator should bid against herself. Knowing when and why to do that gives counsel another tool to garner a win in mediation for the client.

The first instance is at the initial offer or demand. Assume that plaintiff has made a pre-mediation demand of \$1.5 million. Defendant has refused to respond because the demand is so far “out of the ballpark.” What to do? By moving off the \$1.5-million demand a bit—say to \$1.425 million—plaintiff will get the negotiation conversation started, engender some good will in the defense room and demonstrate confidence in its initial number (because it moved only a little). It will surprise the defense (who of course would never bid against itself) and put plaintiff in control of the early negotiation—all at no cost since the case obviously is never going to settle in the \$1.4- to \$1.5-million range. In response, the defense is likely to make a more businesslike, higher offer than it would have made had the mediator insisted that it respond to the \$1.5-million demand.

The second instance is when things are stuck after two or three rounds of minuscule, unconstructive tit-for-tat moves. Plaintiff is telling the mediator it’s time to leave and expressing reluctance to lower its demand. The defense should consider making another offer—that is, bidding against itself—but should shake things up by throwing in some non-monetary term. For example, even without any response from plaintiff, the defense might increase its monetary offer

by a small amount, but also offer to structure the settlement in a tax-advantageous way for plaintiff. Or in an employment dispute, the defense might raise its back pay offer a bit but add an offer to pay for outplacement services. This breaks the cycle of useless mini-moves, increases the “pie” of options available to frame a deal from money alone and again demonstrates confidence.

A third instance comes late in the day, when negotiations have reached an impasse and the parties are still separated by a “hard” but potentially bridgeable amount. For example, plaintiff has demanded \$600,000 as its “final” number, but the defense is at \$475,000 and has told the mediator it will never pay over \$500,000. At that point, the options are to give up (BAD!), for the mediator to make a proposal that he thinks has less than a 50% chance of succeeding (RISKY!) or for one of the parties to do something “out of the box.” Assume that the defense made the last move, to \$475,000, and plaintiff will not counter. The defense could tell the mediator that it will raise its offer to \$525,000, but only if the mediator first confirms that plaintiff will accept it. The mediator will then ask plaintiff whether, if he can get \$525,000 payable in 5 business days, that will do it. More often than not, with a skilled mediator who has by then earned plaintiff’s trust, the answer will be yes. So by bidding against itself, the defense achieved a settlement very close to its \$500,000 bottom line and well below plaintiff’s goal of \$600,000.

Remember that mediation at its best is a flexible, creative process in which confidentiality gives counsel the freedom to experiment, to break “rules” and to shake up the negotiation conversation with an unexpected tactic. Bidding against yourself—when there is a good reason for it—is such tactic that truly skilled and confident negotiators know can work to their advantage. So the next time someone says, “I’ll never bid against myself,” ask, “Why not?” ■

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