



Thoughts On The Initial Demand

In an informal survey of mediators, I have found that our collective experience is universal –the initial demand is extraordinarily high, bears no relationship whatsoever to the verdict potential of the case and is usually counterproductive to the mediation process. Since the initial demand is usually made only after lengthy discussion of the strengths and weaknesses of the case and the range of recoverable damages, it is even more perplexing that it bears no relationship to the recoverable damages in the case.

So why is it that the initial demand is so extraordinarily high? One reason is to satisfy the client's lottery mentality (that going to trial is like buying a ticket to a lottery) that the plaintiff will always win without regard to the millions to one odds in play in the lottery. A second reason is the fear of leaving money on the table. A third is to give the plaintiff's counsel more room to negotiate the maximum settlement amount.

In my view, these are all false premises and counterproductive to settlement of the case. As counsel, part of preparing for a mediation is preparing your client for an objective discussion of the strengths and weaknesses of the case and the likely range of damages. Ideally, that discussion leads to a negotiating strategy that begins with a demand above the high damage range (perhaps in the 2 or 3 times the recoverable damages), but not the 5 to 10 or more times that a jury could ever award and withstand a motion for new trial we often see.

As to the fear of leaving money on the table, that fear will not be alleviated by an unrealistic demand. The standard defense response is a proportionately low offer; rendering the first few rounds of negotiation a waste of everyone's time. After all, defendants will not engage in good faith negotiations until the demand is in a good faith range of the recoverable damages in the case, even if the demand is at the high end of that range.

In terms of giving the plaintiff room to negotiate, the typical pattern of mediation demand and offer is the pie in the sky demand falling precipitously as the defendant makes incremental increases in the offer. However, what many attorneys fail to see is that here is plenty room to negotiate starting with a more reasonably based demand and a party can always stop at or above the bottom line.

From a mediator's perspective, the tip is to get your client on board with a high, but not ludicrous demand that bears some semblance to the recoverable damage in the case. Don't worry, the defendants will never pay that number, but will welcome the opportunity to initiate meaningful negotiations much earlier than at the very end of the mediation day.

– Bruce