

NEGOTIATING THE BEST SETTLEMENT TERMS

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I. INTRODUCTION

Today, most lawsuits and claims are resolved through negotiation and mediation, as opposed to trial. Despite the fact that a negotiated resolution is the usual outcome of any legal dispute, most lawyers spend much more time refining their trial skills than they do their negotiation skills. This paper is my personal response to my own belated recognition of this fact. While most of the concepts and principles discussed should be familiar to anyone who has haggled over the price of anything, it is important to understand how negotiating a legal dispute is different from negotiating most other transactions. The typical business and commercial transaction is a voluntary affair where both sides have chosen to negotiate with each other. This class of negotiations can usually be characterized as win/win situation. Both sides win when a deal is reached. Both sides can walk away without significant risk if no deal is done. However, legal disputes involve rights and claims that are enforceable in a court of law. The court system itself is a compulsory and adversarial process. The participants have not voluntarily chosen to deal with each other. Instead, the process that has brought them together is more arbitrary and has more in common with a shotgun wedding than a traditional marriage proposal. In litigation, the participants are not ultimately at the bargaining table of their own free will even when both sides see the benefit of reaching a settlement. Because the good will and feeling of mutual advantage that are usually present in other types of negotiations are often absent in a legal dispute, the negotiating environment tends to be much more acrimonious, abrasive and combative. This psychology makes negotiating a legal dispute very different from any other type of transaction.

II. ULTIMATELY, IT IS ALWAYS ABOUT THE MONEY?

While adversaries in a legal dispute may initially have a number of different goals, the final settlement decision almost always comes down to a decision about money. The Plaintiff's initial motivations in contacting a lawyer can be wide ranging. However, the primary remedy that our civil justice system is the compulsory payment of monetary compensation. So at the end of the day the final decision the Plaintiff has to make is almost always about money. On the other side of the table, the Defendant may have many reasons for initially denying liability and refusing to make any payment. The Defendant may not want to admit to wrongdoing. The Defendant may not want to do anything to would encourage similar claims. The Defendant may sincerely believe that no wrongdoing occurred. However, most Defendants (or their insurers) ultimately make the business decision that involves paying the very least amount of money that will enable them to avoid the time, risk and costs associated with continuing to defend the case through trial. Stripped of all ancillary facts, the plaintiff and the defendant are negotiating the price of a release from all future costs and risks associated with the claim. The only question is whether the plaintiff and the defendant agree on the price to be paid.

III. KEEPING YOU'RE A HEALTHY PERSPECTIVE

Given the differences in what each side is attempting to accomplish, the opposing lawyers come to the negotiating table with very different perspectives. Even when looking at the very same facts, one side may see reckless disregard where the other side sees no wrongdoing at all. This difference results in part from differences in the quality of each side's respective evaluation, and in part from a phenomenon known as "attitude polarization." Attitude polarization is commonly observed with emotionally charged issues or in emotionally charged

settings. Attitude polarization increases when people on the same side of an issue repeat and validate each other's statements. This type of self reinforcing activity is far from uncommon in the litigation setting. Ultimately just how differently each side sees the facts is at any given time is best measured by looking at the existing gap between the "demand" and "offer".

One of the primary goals of the negotiation process is to avoid the costs and risks that accompany an undesirable outcome at trial. The avoidance of undesirable outcomes starts with accurately assessing the respective risks. This can only be done by finding and analyzing all the available facts. Most lawyers have had the opportunity to hear litigants from all educational, economic, racial, ethnic, religious and gender backgrounds tell their version of the truth about what happened. Whether these facts are being recounted at an initial meeting, while giving sworn testimony, or while at a mediation, always listen objectively to what is being said. Not infrequently, the facts that have been remembered are largely favorable while those that are less favorable have been consciously or unconsciously glossed over or left out altogether.

Remaining objective when looking at the facts is often more difficult than it sounds particularly given the nature of the adversarial process and the money at stake. When agreeing to represent a client in a legal dispute you are taking sides or associating yourself with one team against the other. Taking sides generally has a tendency to make us more partisan. We have all seen examples where partisanship causes groups to condone or excuse actions when done by their own that they would condemn if done by the other side. There can be a tendency to accept our own client's story at face value even when there are inconsistencies. The client can consciously or subconsciously be telling the lawyer what the client perceives the lawyer wants to hear. The client can become dissatisfied if they perceive that their lawyer does not believe everything they say, or if their lawyer does not show enough confidence in the case or share the

disdain for the other side. When representing the plaintiff you may simply want to believe that your case is better than it is. When representing the defendant you may feel pressure to deliver a favorable result regardless of the facts.

All of these factors can subtly degrade your objectivity. Therefore, it is important to keep in mind that not everyone who will provide harmful testimony has an agenda or is lying or is on the take. The most prudent course is to maintain a reasonable degree of skepticism when looking not only at what the other side says but also in looking at what your own client and witnesses have to say. Aside from taking the time to perform a detailed evaluation of the case on the front end, maintaining a reasonable degree of skepticism is best thing that you can do to avoid unpleasant surprises. More importantly, a favorable settlement will often happen only in those cases where you see actually see and understand all of the strengths and weakness.

From the standpoint of defense counsel, when a file is assigned by the insurance company most insurers want an early assessment as to how defense counsel views the case. The insurance company (or corporate client) will at a minimum want to know your initial opinions on liability, the potential verdict ranges, settlement ranges, and your recommendations for future handling. The insurer will also want to know what additional factual information needs to be obtained and any investigation and discovery necessary. If not enough information is known about the plaintiff's injuries, defense counsel is normally responsible for suggesting the means for getting the information necessary to provide these initial estimates. Accurately providing a settlement value usually requires additional investigation, research, and detailed case summary in all but the most straightforward cases.

Because the Plaintiff usually goes first (and can essentially pick a number out of thin air), it is important for the Plaintiff to keep in mind that the initial “demand” will not be effective in moving the case toward settlement if the defense does not perceive your number to be a reasonably probable outcome at trial. When the plaintiff miscalculates the risks to the other side, the opportunity to settle can be delayed or missed altogether. Similarly, if defense counsel fails to properly evaluate the risks and makes too low of an offer, the result is often an impasse that leaves the plaintiff with little downside to rolling the dice at trial. Avoiding the costs and risks that invariably result from a miscalculation of the case is best accomplished through detailed preparation and the earliest resolution possible.

IV. THE INITIAL EVALUATION

Whether representing the Plaintiff or the Defendant, a detailed initial evaluation should address the following topics:

(1) THE PLAINTIFF’S STORY

- a. Timeline of relevant facts and dates;***
- b. Citation to key supporting documents;***
- c. List of the claimed harms and losses;***

(2) THE SPECIFIC CLAIMS

- a. List all legal claims and theories of recovery;***
- b. Summary of pertinent case/statutory authority;***
- c. Supporting witnesses and key testimony;***
- d. List of key supporting documents;***
- e. Analysis of each claim;***

(3) DAMAGES

- a. List of damages claimed;*
- b. Summary of pertinent case/statutory authority;*
- c. Supporting witnesses and key testimony;*
- d. List of key documents;*
- e. Analysis of damages/*

(4) THE DEFENSES

- a. List all legal defenses;*
- b. Summary of pertinent case/statutory authority;*
- c. Supporting witnesses and key testimony;*
- d. List key supporting documents;*
- e. Analysis of each defense;*

(4) THEMES

- a. Identify Plaintiff's themes;*
- b. Identify Defense themes*

(5) VENUE

- a. Venue demographics;*
- b. Verdict history;*

(6) OPPOSING COUNSEL

(7) PARTIES

- a. Discuss Plaintiff's reputation, background, and jury appeal;*
- b. Discuss Defendant's reputation, background and jury appeal;*

(8) OTHER FACTORS AFFECTING VALUE

- a. Verdicts in similar cases;*
- b. Defendant's needs (time; publicity; consent);*
- c. Plaintiff's needs and expectations;*
- d. Damages caps;*
- e. Amount of insurance coverage;*

(9) LITIGATION BUDGET

- a. discovery and deposition costs;*
- b. experts fees and expenses;*
- c. costs of trial;*
- d. travel expenses;*

While addressing all of these categories is no minor undertaking, in most cases it is nothing less than what is necessary to get the best possible result for your client. Cutting corners early on almost always costs more in the long run. Most lawyers have had situations where the facts seem to turn dramatically against you sometime between the filing of the lawsuit and the trial. Sometimes this is unavoidable but other times the apparently unexpected twist or and turn could have been foreseen or even avoided altogether. The bottom line is that a detailed initial case evaluation is the best way to maximize the chances that your client will achieve an early favorable resolution.

V. THE ROLE OF LEVERAGE

“All you need is a lever long enough and a place to stand and you can move the world.”
Archimedes.

“It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interests.” Adam Smith

“If there is any one secret of success, it lies in the ability to get the other person’s point of view and see things from that person’s angle as well as from your own.” Henry Ford

“Every reason that the other side wants or needs an agreement is my leverage – provided that I know those reasons.” Bob Woolf

“You can get much further with a kind word and a gun than you can with a kind word alone” Al Capone

The concept of “leverage” is probably the most important concept to understand when it comes to achieving favorable settlements. When using the word “leverage,” I am using the following definition: *“positional advantage; the power to act effectively; strategic advantage”*. Or, in other words, it is the power to compel the other side to do what you want them to do. Leverage in negotiation is also often about situational advantage as opposed to objective power. A party may have very little power but still have significant leverage. For example, an individual can have few resources relative to a large corporation but still have situational advantage by virtue of being able to compel the corporation to appear and answer in a court of law. Likewise even when a plaintiff has a legitimate claim which could result in a significant financial loss to the other side, if the plaintiff does not have the resources or commitment to see the case to the end, and the defendant perceives this fact, then the defendant’s leverage is significant by virtue of being able to delay and wait the plaintiff out. So assessing leverage includes figuring out which side is more willing to actually go to trial and, which side has the most financial risk if the case is not settled?

Leverage itself can be real or imagined. Your actual leverage at any point in time is ultimately based on the other party’s perceptions. Their perceptions can obviously differ significantly from the actual facts or from the facts as you believe them to be. The perceptual

nature of leverage can work for you or against. Even when you have favorable facts your leverage is ultimately only as strong as is the other side's perception of your case. Regardless of whether warranted or not, if there is no fear on the other side, you have little if any leverage. Likewise, in those situations where you have an information advantage and know something unfavorable to your case that may not be known by the other side, then your goal is to move quickly to close out the case before that information advantage is lost. You also can obviously be at an information disadvantage. For example, you may mistakenly think that the other side has a stronger case than they actually do. Or you could think that your case is stronger than it actually is because your client has not accurately relayed all of the key facts.

Probably the best way to understand leverage is to think about which side, at any given moment, has the most to lose from a failure to agree. One way objectively evaluate leverage is to repeatedly ask yourself which side you would rather have if you had the power to chose. Would you rather have the other side of the case? Why or why not? You should also take into consideration the psychological principle that most people are more concerned about avoiding potential losses than they are motivated by potential gains. Or stated another way, potential losses loom tend to loom larger in the human mind than do their equivalent gains. When the plaintiff has not been offered any money, he or she has nothing to lose. But when there is a significant offer on the table (i.e., that puts real money in the pocket) combined with a real risk of a defense verdict, then plaintiff has a lot at stake even if the offer is lower than it objectively should be. Therefore, as a general rule the party with the most to lose has the least leverage and *vice versa*.

A final consideration when it comes to leverage is that in the absence of a trial date, the defense usually has all the time in the world. Or as many criminal defense attorneys would say, “you can’t hang my client until you give him a fair trial.” This is particularly true in civil cases when there is plenty of insurance coverage and/or the potential loss is not significant. In this situation what incentive is there to hand over money sooner rather than later? The Plaintiff also lacks leverage when trial is many months if not years away. In such situations the defendant and/or the insurer may have no incentive to settle for anything more than some amount that is on the low end of the probable verdict range. Depending on the cost of the money or the time value of money, there are even situations where it is actually more economical for the defense to delay rather than settle. However, as the plaintiff moves the defendant closer to trial, the time factor can become more favorable to the plaintiff. The closer the trial the more the defense costs go up and the more credible the threat of an unfavorable judgment. When the plaintiff’s case is strong, this results in the defense feeling more of a sense of urgency which often leads to a better settlement for the plaintiff. In a nutshell, from the plaintiff’s side the stronger the case and the closer you get to trial, the more settlement value the case will usually have.

If you have enough of it, leverage is the power not only to compel an agreement, but to compel one on the most favorable of terms. However, always remember that the facts (or one side or the other’s perception of the facts) may change. Your perceived leverage can disappear altogether with the answer to a single question or the discovery of a single fact. So at each step of the litigation process you should be asking yourself: *“What is my leverage? What leverage does the other side have? Is there anything I can do to increase my leverage? and (perhaps most importantly) Is there anything that I am doing that might diminish my leverage?”*

VI. THE “GOLDEN MOMENT”

Most mediators agree with the statement that an “appropriate settlement value exists in almost every case.” The problem is that it is often hard for two lawyers to agree on what that value is. Sometimes you find the appropriate value early on, sometimes you never find it, and other times you don’t see it until after wasting a significant amount of time and money. But regardless, in looking back at cases with the benefit of hindsight, in almost every case there is what can be called a “golden moment.” This “golden moment” is the point in time where your client has the maximum leverage and resulting ability to settle the case on the most favorable terms. The obvious problem with this “golden moment” is that it is often difficult to recognize until after it has come and gone.

There is only one way to increase your chances of identify the “golden moment” before it is gone. This is through a detailed and thorough case evaluation at the outset combined with a clear understanding of your client’s goals and objectives. Taking the time to do this not only increases the chances of a favorable settlement, but it also helps you avoid the expense and wasted time that comes from charging ahead with litigation without all of the facts. To minimize these mistakes, and get to the right settlement number, it is best to take a thoughtful methodical approach.

VII. SETTING HIGH EXPECTATIONS

As a general rule, the best negotiators always set high expectations. Setting high expectations is a product of being willing to prepare the case for trial, and being confident in your ability to achieve a favorable result at trial. Setting high expectations comes from our overall attitude about what we are trying to achieve as well as our beliefs about what is fair and

reasonable. Therefore, a successful negotiation requires that you work with your client to identify and commit to a specific justifiable goal. When you and your client are on the same page, you are more persuasive and the negotiation process will be significantly less stressful.

In reviewing other writings about various negotiation strategies, a commonly repeated theme is that “people who expect more generally get more.” The one caveat is that this is generally true only where the high expectations have a reasonable basis in reality. Again, setting realistically high expectations starts with a detailed evaluation of your case. Only after you have prepared a detailed case evaluation can you come to a conclusion about the probable verdict ranges. Without identifying the probable verdict ranges your expectations will be no better than a guess.

One of the keys to improving your settlement results is to get into the habit of thinking early on about the full range of fair and reasonable outcomes, and then developing an expectation that you should achieve results at the high end of that range. The goal of an effective negotiator is to have expectations that are high enough to present a real challenge while being realistic enough to keep the other side fully engaged in the settlement process. Whether representing the plaintiff or the defendant, in coming up with your own initial settlement range and demand or offer, early on you should always look at soliciting objective outside opinions. These outside opinions should not be limited to lawyers as lawyers frequently think too much alike. Instead, you should look for everyday opportunities to objectively present non-lawyers with both sides of the story and see what questions and reactions you get.

Taking the time to solicit early non-lawyer feedback will help identify strengths and weaknesses that you may never have recognized on your own, or by just talking to other lawyers.

Also because there are very few lawyers on juries, talking to non-lawyers will give you give you the basis for a much more reliable settlement and verdict range. You may also consider using more formal methods for obtaining outside feedback like mock trials or focus groups. Taking these steps will also help avoid “confirmation bias.” Confirmation bias is the tendency to favor or give more weight to information that confirms your own preconceptions or hypotheses. Or stated differently, it is the tendency to selectively gather and interpret information and evidence in a way that confirms your preconceived beliefs.

Whichever way you go about obtaining outside opinions, your goal is the same. You want to have the highest degree of confidence possible in your assessment of likely outcomes. The more confidence you have in your assessment and settlement numbers, the more likely you are to achieve results that are on the high end of that range.

VIII. THE INITIAL DEMAND PACKAGE

Once plaintiff’s counsel has performed a detailed evaluation of the case, and made an evaluation of the probable outcomes, it is time to put together your initial settlement package. From the standpoint of the defendant, the demand package is often the first impression the key decision makers will have when it comes the plaintiff’s claims. So in all but the most straightforward and/or minor of cases, from plaintiff’s counsel should do everything possible to make the most of this initial impression.

In many cases a well documented and well reasoned settlement demand will significantly shorten the settlement process. When your case involves potentially significant damages which will require a substantial settlement, the insurance company through its claims adjuster and/or outside counsel can almost always be expected to perform due diligence before being willing to

make a significant offer. However, a well documented settlement package can dramatically speed up this process. The sooner you provide the insurer with a well documented complete settlement package along with a credible demand, the faster the process you will get to your ultimate goal. The bottom line is that time is money and plaintiffs rarely gain anything from waiting to provide the necessary information.

A well documented settlement package should include all of the following documents where appropriate or warranted:

- (1) copies of medical bills;
- (2) copies of medical records;
- (3) wage loss documentation;
- (4) estimate of future medical bills;
- (5) life care plan;
- (6) graphics, photos and/or video showing injuries and harms;
- (7) heirship determination;
- (8) guardianship/conservatorship;
- (9) lien reimbursement/waiver letters;
- (10) comparable settlements and verdicts in similar cases;
- (11) venue demographic and verdict research;
- (12) treating physician statements or letters;
- (13) liability and damage expert reports;

IX. ESTABLISHING A RAPPORT WITH THE OTHER SIDE

A prime early objective in the negotiation process is to try to establish a rapport with the other side. People generally like other people more when they appear to share similar appearances, attitudes, and beliefs. From a psychological standpoint, you are more likely to say

“yes” to someone you know and like than you are to someone who is trying to bully, badger or intimidate you (i.e., the “little-gator”). Rather than ranting and threatening the other side, the most effective negotiators let their case, and their preparation, do the intimidating for them. Even when on opposite sides of the table, people are more inclined make more concessions to people they like, respect and relate to than they are to people they distrust and dislike. This is as close to a universal law as it gets when it comes to negotiation.

Effective negotiators also often exhibit the ability to see the world from the other party’s point of view. To achieve your goals, you must find out or anticipate the reasons why the other party may not agree to what you want. Only when you know why they will not agree can you effectively address the reasons for disagreement. You can most effectively address the reasons when you are on friendly, or at least cordial, terms with the other side.

What you say at the start of any negotiation process often sets the tone for the entire negotiation. The other side quickly forms an opinion as to whether you are working for a mutually beneficial solution or just out for everything you can get. As a result, be thoughtful when it comes to your initial substantive conversations. If the other side takes a position that you strongly disagree with, don’t abruptly disagree or attack. From a psychological standpoint, attacking the other side’s positions often intensifies the desire to prove you wrong which is obviously counterproductive. Therefore, in the early stages of the negotiation process do not unnecessarily create confrontation.

X. ACHIEVING YOUR GOAL

At the start of a typical negotiation process, you should open with your best straight faced number as opposed to a number that is nothing more than wishful thinking. What we are talking about is a number or opening position that you can credibly and realistically argue as being a probable outcome of trial. During the initial moves in any negotiation, you should strive to stay close to your best straight faced number until you have gathered as many clues as possible about what the other side is willing to do to avoid the risks and expenses associated with further litigation and trial.

Beneath your best straight faced number is your “goal.” Your “goal” is the number that you realistically hope to achieve. Setting this “goal” also requires that you perform a realistic analysis of the probable outcomes of a trial. Once your “goal” is set, the negotiations should proceed as if your “goal” is really your bottom line. In order to have a realistic shot at achieving your “goal”, the other side must ultimately come to believe that it is your bottom line. Your “goal” will likely be effective only if you and your client are both fully committed to achieving it. Setting a “goal” is a waste of energy and credibility if you and your client are not willing to stand by it until the very end. A well reasoned argument in support of each of the moves you make establishes that the number you are telegraphing as your bottom line is legitimate.

It also important to condition the other side for what you hope to achieve. Early in the negotiation process you should strive to give the other side a realistic sense as to what is possible. You want to avoid the problem that occurs when the other side makes the assumption that there is more flexibility and room to move than you actually have. Most experienced lawyers have been to mediations and been surprised to find out that the other side has little if

any room to move from their initial position. These situations are a waste of time for all involved.

XI. NEGOTIATING WITH ADJUSTERS

First and foremost, if you are the plaintiff lawyer you usually have much more at stake when negotiating with an insurance adjuster than does the adjuster. The adjuster usually gets paid the same whether the case settles or not. For some reasons plaintiff lawyers are often more confrontational in pre-litigation negotiations than they are in mediation. However the general rule that people say yes more often to people they like is equally applicable to both situations.

When it comes to negotiating with insurance adjusters during the pre-litigation phase, it is important to remember that you are negotiating with a real person not a machine (even though they are often trained to evaluate cases without emotion). Just like regular human beings, insurance adjusters can often be persuaded to change their position (at least when they actually have the discretion/authority to do so). But regardless of the amount of discretion the adjuster has, respect often begets respect. Therefore, you are more likely to reach common ground if you convey the perception that you have fully considered both sides in making your arguments.

You should also remember that filing suit is not a declaration of war. This is particularly true in smaller cases. Most adjusters and claims professionals for self insured corporations do not fear a routine lawsuit. So there is no reason to act as if the filing of your lawsuit is a catastrophic event that will spell gloom and doom to the other side. Often acting as if the filing of a routine lawsuit is a major event suggests that you are actually an inexperienced trial lawyer. The better attitude to convey is “been there done that.” This is usually more effective than

anger and frustration in communicating confidence in your demand and willingness to go to trial. Often the bigger the show you make and the more you personalize the dispute, the more likely it is that your threat to file suit will not result in any improvement of your position. This is also reinforced by the fact that most experienced adjusters and in house counsel know that most lawyers would much rather settle a case than file suit or go to trial.. Nevertheless, if you do reach an apparent deadlock, you should almost always send a copy of your complaint and initial discovery to the adjuster along with your final demand. If the negotiations end badly after that, then simply agree to disagree and move forward with your lawsuit. If you have done your best there is no reason to take a failed negotiation personally. The discovery process and a jury trial will ultimately tell you if you were right.

XII. EFFECTIVE USE OF THE COMPLAINT

Because 90% of lawsuits eventually settle, the impact of your initial pleadings and demand/notice letters should be maximized. You should consider viewing the initial complaint as a “marketing tool” which should be drafted with its audience in mind if an early settlement is your goal. That audience is the defendant and anyone else who will be involved in the settlement decision making process. While a short notice pleading complaint does little more than start the litigation process, a detailed well written complaint can send a much more explicit message. While a detailed complaint can be somewhat superfluous when you have already sent a detailed demand package, the sending of the complaint to the defendant and/or adjuster often represents your last chance to resolve the case before another attorney becomes involved. In addition, when drafted properly a complaint is by its very nature a more serious and formidable document than is a demand letter, and as a result it can have a different psychological impact on the defendant.

Drafting a persuasive complaint requires setting out the specific facts and claims in a

manner that conveys both your readiness to take the case all the way and the potentially serious consequences should the defendant elect not to try and settle the case. On the other hand, cursory, wordy, vague, rambling and/or poorly drafted complaints are still common and show a failure to appreciate the importance of making the strongest impression possible. Even where a settlement does not result, a well drafted complaint will often save you time and stress down the road as you are much more likely to have properly pled and supported all possible causes of action.

As with all other stages in the litigation process, it is necessary for you to have a good grasp of the facts and applicable law in order to draft the most effective complaint as well as the initial discovery. In certain circumstances you may also be well served by including your proposed initial discovery along with the complaint when it is likely to add additional pressure on the defendant. As with a well documented settlement package, a persuasive complaint and probing discovery requires the initial preparation of a detailed case summary. A detailed case summary is equally important when it comes to effectively representing clients on the defense side as it allows the defense client to make the best business decision possible as well as to attack and expose the flaws and weaknesses in the plaintiff's case early on in the process.

XIII. MEDIATION

A. When to Consider Mediation

Mediation has become the preferred method of resolving cases as jury trials are ever more infrequent. Mediation has become popular at least in part because it has been shown to be extremely effective. In cases where discovery has reached the point where most of the essential facts have been shared or uncovered, there is usually little reason why it is not advantageous to

attempt to settle the case. Even where one side or the other is confident that they will prevail at trial, there is a reason most lawyers are unwilling to guarantee a win. It is the inherent unpredictability of trial that makes it advantageous to settle rather than try most cases.

As a practical matter, there are very few cases which are not appropriate for mediation.

Unsuitable cases include situations where:

- a legal precedent needs to be set;
- resolution by summary judgment is probable;
- a party needs emergency injunctive or other protective relief;
- publicity is sought;
- there is no real interest in settlement;

In deciding whether or not to mediate, a number of reasons are frequently given as reasons the parties ultimately agreed to mediate. These include the:

1. **Clients.** One side or the other needs assistance with client expectations. Trial lawyers must walk a fine line when it comes to candidly advising their clients of the risk of an unfavorable result while at the same time conveying the sense of confidence that the client expects to see in his or her lawyer. A mediator can provide a neutral and objective evaluation of the case and help temper overly optimistic predictions of success. Lawsuits also usually generate strong emotions in the parties and their lawyers. A mediator can lend an ear where one or more of the parties needs the opportunity to vent their frustrations. Mediators are also trained to restate antagonistic statements in a more constructive fashion.
2. **Cost.** Mediation, if it results in agreement, will usually be much less costly than continuing with the litigation.

3. **Control.** The parties and their principals typically have a much larger role in the outcome of mediation than they will have if the case goes to trial. Mediation is almost always the best way to resolve a dispute that involves parties who will possibly have a continuing relationship.
4. **Confidentiality.** There are no newspaper or internet headlines. Mediation generally affords the parties the opportunity to construct a settlement that can be as private as desired.

While mediations are generally most effective when a trial date is on the horizon, mediation can often help settle cases well in advance of trial. This is because next to an approaching trial date, mediation is the most effective way to reach a settlement agreement. Outside of an approaching trial date, nothing is better than mediation at focusing the attention of the key decision makers. Absent an approaching trial date or mediation, the key decision makers (i.e., the adjuster, the parties and the attorneys) are often not focused enough on the case at the same time to make settlement likely without some intervention. It is difficult to focus on a case that isn't going to come up for trial for many months or even years. An agreement to mediate establishes a specific time where all parties and representatives will (a) gather together in the same building, and (b) will have gotten up to speed on the case at the same time. If the requisite discovery has been accomplished, all will have a good idea of where they think the case should end up. The only thing left to do in order to accomplish a settlement is to see what everybody else thinks the case ought to settle for.

Other factors to consider when making the decision whether to mediate or not:

- Are key decision makers or people with authority going to be present?
- Has the defendant consented to settlement?

- Is the policy a wasting policy?
- Are excess carriers participating?
- Does the defendant have personal counsel?
- The policy limits?
- Unresolved coverage issues?
- Financial condition of Defendant?
- Financial condition of Insurer?
- Desire to avoid litigation and/or publicity?
- The Plaintiffs financial condition?
- The costs of litigation?

B. Effective Mediation Preparation

The first step in preparing for a successful mediation is agreeing on a mediator. Depending on the case, you will want to balance between choosing someone who is more likely to sympathize with your own client's position and choosing someone who is likely to be able to persuade the opposing party to agree with your point of view. The more opposing counsel trusts the mediator, the more likely your message will be heard during the caucuses.

The second step in preparing for a successful mediation is coming up with your negotiating plan. Many attorneys who attend mediation are not prepared to get the best possible deal for their client. In talking with various mediators, it is a common refrain that those lawyers who truly understand the mediation process generally get better results. Should your opening offer or demand be at the extreme end of theoretically possible outcomes? Or should it only be as high or as low as what is reasonably probable? When done properly, your first moves have the power to draw the midpoint of compromise closer to your client's goal. As the parties move

toward the center of their opening positions, the concept of “bracketing” comes into play.

Should you elect to start at an objectively reasonable place, you should normally only be willing to give additional ground only when the other party likewise responds with an objectively reasonable number.

Extreme first offers are usually counterproductive and a waste time (i.e., talking to the mountain). You are also less reactive and more proactive when you come to the mediation with a well thought out and flexible negotiation plan. In coming up with your negotiation plan, it is helpful if you and your client agree in advance to both your goal and your walk away number. Your walk away number is where you are willing to say no and go to trial. The problem with bottom lines is that when you have one there is a tendency to unintentionally telegraph that number during the course of the mediation. We naturally gravitate toward the point that has the most psychological significance which is invariably our ultimate bottom line. This tendency to telegraph our bottom line can best be countered by focusing on a well reasoned “goal” instead.

In formulating your negotiation plan, you should:

1. Have the clients talk candidly to you about what they really want to accomplish;
2. Set an optimistic but specific goal;
3. Discuss and agree on a specific bottom line or walk away number;
4. Be committed to the goal;
5. Decide your initial offer/demand;
6. Game plan at least 3-5 subsequent moves based on the likely moves by your adversary.

While you must be flexible and adapt your negotiation plan as the mediation progresses, until you have a pretty good idea of what goals the other side has, and what the other side thinks is fair and reasonable, you should keep your own eyes firmly on your specific goal. It is equally important to remember that nothing appears more disconcerting to the other side than the sense of quiet confidence and commitment that comes from a client and lawyer who know what they will and

will not take, and why they ought to get it. Remember, the more prepared you are, the more in control you will be, and the less stress that will result even if the mediation is unsuccessful.

In preparing for mediation, it is also important to remember that it's your client's case as opposed to your case. This might seem obvious, but it is easy to lose sight of the fact that it is your client's life, business, and/or future at stake. Both plaintiff and defense lawyers have to resist letting their own financial interest interfere with or shade the decision making process. When a lawyer consistently focuses on the client's needs and objectives, the best interests of the client are protected. Therefore, to facilitate a successful outcome the lawyer should meet with the client prior to the mediation to clearly identify and understand the client's goals, expectations, needs and objectives.

Once the client's needs and objectives are identified, the lawyer must analyze the facts of the case without emotion, and incorporate that assessment into the negotiation plan. Because of the client's emotional involvement in the case, it is not unusual for clients to have flawed liability assessments or unrealistic expectations with regard to the probable outcome. This will manifest itself in unreasonable and unrealistic settlement demands or conditions. Unreasonable demands and conditions in turn produce equally unrealistic and hostile responses from the other side. While the lawyer must be passionate about the case, to best advise the client it is no less important to maintain an objective and unattached view of the big picture.

In talking with different mediators, it is apparent that many lawyers do not prepare much at all for mediation. The informal structure and non-binding nature of mediation serves to instill a casual attitude about the process and the need for preparation. This is unfortunate for two reasons. First, our clients rely on their lawyer to be prepared and to guide and advise them through the process. The decision to settle a case is often a major decision that will have a major

impact your client. If the other side has more information, and is better prepared, it is difficult to get your client the best possible settlement. Second, mediation is often the best, and on occasion the only, opportunity to settle the case on favorable terms.

Part of your preparation should include preparing your client to respond to and interact with the mediator. Often the lawyers or representatives will ask a question or make a point that your client can and should answer directly. Therefore, the client should be prepared to talk about the case. Ideally the client preparation should be done in advance of the mediation as opposed to the morning of, or during, the mediation. You should also take steps to insure that your clients expectations are realistic and are in line with your own evaluation. Identify and explain to the client the best and worst alternatives to a negotiated settlement agreement. Educating your client will also minimize the chances that you lose client control and end up with an unfavorable settlement.

The most important variable that you can influence to increase the chances of a successful mediation is the degree to which your client understands and appreciates the risks and benefits of settling versus going to trial. An injured plaintiff should also understand that there is no magic wand to make what happened go away. Mediation cannot change what took place in the past or undo much of the damage that has been sustained. But mediation will allow both sides to use dialogue to explore some appropriate remedies that may, in some ways, compensate the injured person.

Once prepared, attorneys should use the mediation to improve your client's current position. While a trial is a battle, mediation is more of an exploration where you are seeking to learn what is important to the other side. You can use the process to gain information that will help you evaluate the relative strengths and weaknesses of your own claim and further prepare

you for trial if necessary. By using mediation as a tool in this way, you can enhance your advocacy skills and better serve your client's needs.

C. The Mediation Process

As part of your mediation preparation, you should first educate your client about the process itself. This is usually more important when you represent the plaintiff, but it should not be neglected by defense counsel. Knowledge about the process and your overall negotiation strategy will help reduce anxiety. You should explain that mediation typically starts with an opening session where all parties are present. Each party will briefly present their case before retiring to separate rooms. The Mediator then meets each party in turn to discuss their cases with them. The Mediator will continue to shuttle between the parties reporting offers and counter-offers, proposals and counter-proposals or transmitting information where appropriate. There may also be another joint session. If both sides genuinely wish to achieve a compromise, one will usually be achieved.

The Opening Session: The tone of your opening presentation should strike a balance between showing an interest in settlement and demonstrating a willingness to litigate. However, beyond that basic principle, there appears to be no consensus when it comes to how elaborate and involved the initial presentation should be. Some lawyers take the position that by the time the case is ready for mediation, there is little if anything to be accomplished a formal presentation. You just need to tell the other side you are here to negotiate in good faith and move straight to the private caucuses. Some lawyers also are concerned that initially saying too much when the chances of settlement are uncertain risks revealing your trial strategy. Other lawyers argue that choosing not to make a presentation is akin to waiving your opening statement at trial. These lawyers see the opening session as being possibly your one chance

before trial to speak to the other side directly. To not say anything is to miss an opportunity to help the other side appreciate their risks of proceeding to trial.

If a presentation is made, it should set out a cohesive story or theme as clearly and concisely as possible. Demonstrative evidence, such as videotapes and graphics, are often very effective in educating the other side about what you will be able to prove at trial. The initial joint meeting provides the lawyer and client an opportunity to speak directly to the other principal(s) involved in the mediation. While few mediators would suggest the lawyer and client make a presentation that is so polished that it seems canned, the failure to adequately plan a presentation can result in missing a major opportunity.

During the mediation parties often withhold from each other information about the strengths and weaknesses of their positions. This is based on the fear that if you reveal or acknowledge any weaknesses in your case, it will diminish your bargaining power. Or, if you reveal certain strengths you will lose the element of surprise at trial. As a consequence, the parties are reluctant to talk openly and directly and would rather spend their time in private sessions with the mediator. However, with or without an elaborate opening the analysis of the various claims and defenses will usually be the dominate focus of the early stages of negotiation.

Shuttle Diplomacy (Caucuses): Most of the communication during mediation occurs in caucuses where the parties are in separate rooms and the mediator shuttles back and forth between them carrying information, offers and counter-offers. During these caucuses, there may be a information that you want kept confidential. When that is the case you should outline such items for the mediator and specifically request that they be kept secret. Given that most mediation's involve a series of meetings with the mediator, it is important for advocates to use

the time when the mediator is meeting with the other side to consider any information the mediator may have conveyed that you had not previously considered or fully appreciated. Where appropriate the analysis of new information or perspective on the other side often results in changes to both your goal and bottom line.

D. Bringing the Mediation Process to a Successful Conclusion

When it comes to bringing the mediation to a successful conclusion, even experienced lawyers often fail to recognize that they have not planned their negotiations as well as they have the rest of their case. Instead of having a game plan for responding to the other side's different moves, they react reflexively to small moves by walking away, demanding that the other side bid against themselves, or by throwing low ball or absurdly high proposals back at the other side. They often react in ways that actually impede the progress of negotiation. Examples of these emotional and counterproductive responses include:

- “I’m not going to bid against myself!”
- “That’s insulting. Is that what they think my leg is worth?!”
- “That’s insulting. Who do they think they’re dealing with?!”
- “Go tell them to give me a realistic number!”
 - “I’m not even going to dignify that number with a response!”
 - “I’m out of here!”
 - “They’re just not here in good faith!”

These emotionally charged responses can often begin a downward cycle. Left to their own devices, lawyers often continue in reactive mode until movement stalls out or ceases altogether. Proposals made in reaction to a small move by the other side inevitably lead to an

impasse unless a skilled mediator intervenes. In the defendant's room, an angry outburst occurs in reaction to a proposal from the plaintiff that is "in La La land". The thought process is often this: "The plaintiff's so high; we're so far apart; this is a waste of our time and money." The reaction in the plaintiff's room to a low ball proposal is basically the same from an emotional standpoint: "The defendant is so low its insulting; they are accusing me of lying; or they are jerking us around and don't believe my injuries are real."

Avoid the "mediation killers". These are the things that can and often do get in the way of a successful mediation:

1. Not having the right persons to the table;
2. Unreasonable offers or demands;
3. "Bottom line" offers;
4. Being impatient or giving up prematurely;

In almost all situations, and assuming you and your client would actually prefer a settlement to a trial, you should make every effort to keep the other side at the table. The simplest way to accomplish this is to respond with a move of your own in response to every move by your adversary. If a mediation is not going to be successful, it is almost always better to leave the ball in the other side's court.

E. The Likability Factor

From the standpoint of the Plaintiff, mediation is often the first time that the claims adjuster and other decision makers comes into contact with the Plaintiff and the Plaintiff's attorney. Many times this meeting will lead to a change in the initial evaluation. Whether this

change is for the better or worse depends entirely on the impressions that are made. If the decisions makers form an initial favorable impression of the Plaintiff, this often alters the typical preconceived notions that are held about the plaintiff's motivations and credibility. Most litigation professionals (regardless of which side you are on) should strive to resist the tendency to become overly confident in their own judgments and assessments of other the other side. But the takeaway from this is that if the claims adjuster likes the Plaintiff or believes the Plaintiff to be credible, he/she will fear the jury liking the Plaintiff. Likewise, and regardless of whether right or wrong, if the adjuster has a negative impression, he/she will be confident that the jury will ultimately share the same opinion. Therefore, direct communication between the plaintiff and the decision maker on the other side can be a game changer.

XIV. MISCELLANEOUS TECHNIQUES AND CONCEPTS

NEVER SAY YES TO THE FIRST OFFER: This would appear self evident. But saying yes to the first offer does apparently happen. In addition, when the initial offer or demand is accepted, it usually triggers two thoughts: (1) I could have done better; (2) Something must be wrong. In order to avoid this problem and get the best deal possible, make sure your client is prepared proceed at least a few steps beyond the initial offer or demand.

THE FLINCH: Show some degree of shock and/or surprise at the other side's initial proposal. When people make a proposal, they instinctively watch for your reaction. Don't let the other side (or the mediator) see a reaction that conveys a sense of ecstasy or relief. As a plaintiff, you want to appear to be a reluctant seller throughout the process. As a defendant, you want to appear to be an unmotivated buyer throughout the process. If done properly, this technique can help adjust the other side's expectations and result in subsequent moves being far more generous.

LISTEN: One of your goals in the negotiation process is to obtain as much information as possible about the other side's interests, issues and perceptions. In most negotiations your client is often better served early on when you do more listening than talking. You should focus initially on asking questions and listening as opposed to delivering information. The most skilled negotiators try to focus more on receiving rather than delivering information. Probe first and disclose later.

APOLOGIES: Defendants frequently fail to take advantage of the fact that many plaintiffs are actually reluctant litigants. If the plaintiff believes that the defendant is genuinely sorry for what happened (even if not admitting fault), or acknowledges at least some responsibility for the loss (which can be done confidentially during mediation), the plaintiff is more likely to accept less money than they otherwise would be. Even if the defendant does not believe a mistake was made, the defendant can benefit from expressing sympathy and explaining how certain problem occurred and how certain decisions were made.

WHO GOES FIRST: The loser in any negotiation is the one who speaks first. Whenever possible you should try to get the other side to state his or her position first. There are a number of reasons for this. The other side may be more concerned about the case than you anticipated or even understand. The other side may have something to hide. Normally, the only way you can do this from the Plaintiff's side is if the status quo is fine with you. When the status quo is fine, and you are willing to go to trial, then there is no pressure to make a move or even an initial demand. Be bold enough to wait for the other side to approach you and then tell them to make a proposal. "I am comfortable with the way things stand. If you want to discuss a change of course then you will have to make a proposal to me". Or such other words to that effect.

THE HIGHER AUTHORITY: The negotiator who is also the ultimate decision maker can be at a disadvantage. When the other side knows that you have the final authority, they only have one person to convince. However, when you have to answer to a higher authority, at least in appearance there are more people that have to be convinced. This real or imagined deference to a higher authority is even more difficult to deal with from a psychological standpoint when it is a vague group or committee as opposed to a single specific person. This technique is particularly effective when used by the defendant. It can help avoid confrontation by allowing the negotiator to appear sympathetic and compassionate. In litigation, this technique is best countered with patience and a firm commitment to your goals.

THE WHISPER NUMBER: A “whisper number” is nothing more than an indication of what you might be willing to push your client to accept if there is a firm commitment by the other side that they will get there if you do. “My client hasn’t agreed to this, but if I can get him to x, will you go there?” The “whisper number’ can be an effective way to close the gap.

THE WALKOUT: In the end, only two things will determine whether the mediation or negotiation is successful: (1) the amount the defendant is willing to pay, and (2) the amount the plaintiff is willing to accept. If these numbers don’t meet, then you and your client have the power to walk away or to give a drop dead number. Walking away is the ultimate action to convey to the other side that you are actually at your bottom line. Walking away can be done with or without making your own best offer or demand. However, walking away is inherently risky and can destroy your credibility. So before you walk away, make sure your client has a full understanding of doing so.

DEADLINES: In a typical transaction, the appearance of scarcity, or what is known as the scarcity effect, can be utilized to close a deal. This refers to our tendency to want something

more when we think that the supply is limited or that someone else is going to buy what we want before we can. Marketers and retailers use the scarcity effect with at least some regular success. Online retailers create the appearance of scarcity by saying things like: “only two left at this price.” In the context of a legal negotiation the same effect can be accomplished by making the other side believe that the opportunity to resolve the case is about to go away. This is particularly effective when the other side would accept the deal that is on the table but is pushing for a better bargain. There can be a tendency to push the panic button when all the sudden it appears that this opportunity is about to disappear. In the litigation context, scarcity effect can be accomplished by establishing real or artificial deadlines. The goal is to create the impression that time is running out on the opportunity on the table. However, the effectiveness of any deadline is only as good as the concern it causes the other side of the table.

GETTING THE OTHER SIDE FULLY INVESTED IN THE MEDIATION: The more time someone invests in an activity, the more committed he or she is to seeing the process through. Likewise, as we invest more time and energy into any negotiation, there is a tendency to become more committed to closing a deal. This is particularly true when it comes to the time we invest in a particular mediation, and it applies to the both lawyers and the clients. To take advantage of this psychology, one side may string the mediation out solely for the purpose of getting the other side so invested in the process that it becomes harder to accept failure. This psychology can also result in a willingness to make bigger concessions later in the day or to gain relatively small concessions at the end of the day like shifting the costs of mediation.

THE SCRIPT: Some lawyers and insurance companies effectively use a script in negotiations. This can be make for a confusing and hard to read negotiation. A script involves pre-planning most if not all of your moves. The script is followed regardless of what the other

side does which eliminates the mental gymnastics of trying to decide what to do next. It can be used to prolong a mediation to get the other side both mentally tired and fully invested in the litigation.

SPLITTING THE DIFFERENCE: The most frequently used closing technique is to offer to “split the difference.” Regardless of what people say, everyone is aware of the midpoint. In talking with mediators, the most likely settlement in any case is somewhere close to the midpoint between the opening demand and the opening offer. In cases where there have been multiple moves back and forth, there often comes a point in time where one side proposes simply meeting in the middle. This process appeals to our general sense of fairness and reciprocity.

LETTING THE OTHER SIDE WIN: This is not about deliberately allowing the other side out negotiate you. Rather, it is about letting the other side feel from a psychological standpoint that they have won. It is better to give the other side the feeling that they have won concessions than it is to act as if you have crushed them. This is done by initially asking the other side for more than you expect so that you can grudgingly make as many concessions as possible. By conceding little at the outset you have room to negotiate later. Moreover, you can always make larger concessions later but you cannot take back what you have already given away. It is through your own begrudging concessions that the other side will feel that they have reached a good deal.

AVOIDING DELAYS: In a perfect world, after the case is settled the plaintiff’s lawyer could just pick up a check, pay the client, and enjoy the fee. However, agreeing on the settlement amount is often far from the end of the process when liens have not been addressed. In terms of the hierarchy of the great lien headache, Medicare liens are often the most painful. When a personal injury plaintiff receives Medicare benefits, Medicare has a subrogation

interest to any award given in a workers' compensation, medical malpractice or auto accident claim (both first and third party recoveries). While Medicare has been provided a direct right of action, they usually choose to piggyback off personal injury lawyers seeking compensation for their clients. A Medicare lien takes priority over all other liens or interests on any settlement or judgment proceeds. If you ignore the lien, Medicare can later seek a recovery not only from the injury victim, but also the lawyer. Unlike many liens, notice is not required, so lawyers need to find out if there is a Medicare lien, as opposed to sitting back passively waiting for a lien notice. Under the statute, if the lien exceeds the amount of the recovery, Medicare recovers the entire lien, excluding only the lawyer fees and expenses. Medicare does have the authority to reduce or waive its Medicare lien if it is in the “best interests of the program,” if the “probability of recovery, or the amount [of the recovery] not warrant pursuit” of the lien, or if enforcing the lien would lead to significant “financial hardship.” Not surprisingly, the more of a reduction you seek, the more hoops you have to jump through. If the request exceeds a certain amount, the Department of Justice decides whether a reduction is in order. Obviously, this adds more time, more phone calls and more letters to the process. There is nothing more frustrating than killing yourself to get to a settlement only to realize you still have work and time before you can get paid. But in many cases, it is the most essential work a lawyer can do on the case in terms of achieving some measure of justice for your injured client.

XV. CONCLUSION

The principles discussed have been around as long as humans have bartered over goods. After reviewing many new and old articles and books on legal and business negotiation, I can say with some degree of confidence that effective settlement negotiation basically comes down to only two things. One is preparation. The more prepared you are beginning with the early

stages of the litigation process, the better settlement results you will inevitably obtain. Or at the worst, you are more able to avoid getting bogged down in a case that you either should not have filed or that you should have resolved much sooner. Second is applying the concept of leverage. Preparation usually leads to a better understanding of your leverage, and if you understand and utilize your leverage effectively, you will be much more likely to achieve your goals or recognize those situations where no deal is better than a bad deal (and vice versa).