

# Mediation: The Goldilocks Opening Demand

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The opening demand in a mediation is an opportunity for plaintiff's counsel to plant an anchor for the outcome of the mediation.

Sometimes, however, the opening demand becomes irrelevant or, even worse, an impediment to settlement.

Is it too high?

Is it too low?

How can a plaintiff craft a "just right" opening demand?

Here are two real-life examples of opening demands that didn't turn out too well:

1. Opening demand: \$4.8 million.

This was a low-six-figure case. Everyone knew that. Plaintiff's counsel justified his demand by saying that if he didn't start well into seven figures, the defendant's counteroffer would not reach six figures. This backfired, as the defendant's counteroffer did not exceed five figures.

2. Opening demand: \$175,000 (very close to the plaintiff's bottom line).

The defendant had a rule of negotiation that any initial demand was to be automatically discounted to one-third of the demand. Having come to the mediation with authority for

something close to the plaintiff's demand, the defendant instead decided not to offer more than mid-five figures, based upon this "rule" of negotiation.

If all clients and counsel were economics and math majors in college, and economists in practice, they would calculate the potential verdict, discount it by the likelihood of success/risk of loss, deduct the cost of litigation (in both dollars and hours) and determine a number. In the real world, parties and counsel are part economic creatures and larger part psychological creatures. This means that a defendant who receives a plaintiff's opening demand is not just hearing a number, but is hearing a statement that is a value-laden indictment. The "wrong" demand triggers strong automatic emotional responses.

A plaintiff will generally make a very high opening demand because they believe that the defendant is expecting it, which will then lead to a back-and-forth downward negotiation. A plaintiff will also make a high opening demand because they place a higher value on their claims than



the defendants do. This is the endowment effect, which causes people to "endow" the things they own with greater worth than they may realistically have, simply because they own them. Studies have shown that we tend to value what we own more than we would pay to purchase it if we did not own it. That is a very common mindset for a plaintiff: She has her claim, it is a personal vindication of her rights and it is worth a lot to her.

If everyone knows that the plaintiff is going to start with a high opening demand, what is the harm? The psychological impact of fairness—that's what. People will walk away from a deal if it violates their notion of fairness and, to a lesser extent, does not appear to be based on logic. A

plaintiff who makes a demand that is too high (outrageously high, in the opinion of the defendant) risks losing credibility and appearing unfair. If you want to witness this firsthand by replicating a well-known experiment, find two people who do not know each other. Tell one, the “divider,” that he has been given \$1,000 to divide between himself and a stranger. The stranger, the “chooser,” will then either accept the offer or reject it. If the offer is accepted, both will get to keep the money in the proportion determined by the divider. If the offer is rejected, neither gets anything.

Assume the divider “demands” that he keep \$900 and thus offers to give \$100 to the chooser. Almost always, the chooser will turn it down. Most people will reject any offer until it reaches about 40 percent of the total. Yet that same chooser would feel quite happy if he were to find a \$100 lying on the sidewalk. Allowing the divider to keep \$900 of the \$1,000 (or 90 percent) does not seem fair to the chooser, even if it means there is no deal and he gets nothing.

Once a party feels a certain way about the “fairness” of a negotiation, that party may summarily reject any demand that doesn’t seem fair. Fairness requires that the demand bear a logical relationship to the value of the claim. Opening demands that are not

based in reality and at or near the theoretical maximum amount the plaintiff might obtain at trial are seen as “unfair” and insulting. In many cases, a defendant who had been prepared to put a significant settlement offer on the table may walk away and not respond to, or even reject, a reasonable mediator’s proposal, all because of an extreme negative emotional reaction to a too-high demand. There are examples of defendants who arrived at the mediation with the authority to settle the matter only to refuse to make anything other than a *de minimis* offer when faced with a too-high demand, because it wasn’t “fair” and the plaintiff made no effort to tie it to any actual damage calculations.

At the other extreme is the “too low/too reasonable” demand. The plaintiff, not wanting to spend all day negotiating, decides to make an opening demand that is very close to his bottom-line number. Rather than triggering a quick resolution, this may have the opposite effect of the defendant “devaluing” the demand.

Then there is the concept of reactive devaluation, in which one side devalues something offered by the other side. After evaluating the case and prior to the mediation, your client tells you that he’ll pay \$100,000 to settle, and not a penny more. You begin the mediation, and the plaintiff makes an initial

demand of \$110,000. You tell your client the good news (“The plaintiff’s demand is easily within our range, and we can counter and get this settled quickly.”), but your client is not happy. She doesn’t like the defendant and gives no credibility to anything he suggests, even when it was what she wanted (or thought she wanted). Sometimes things that are offered are much less desirable once they’ve been offered, especially when offered by someone to whom you are adverse.

When faced with a client who wants to make demand that is too high, or too low, it is counsel must revert to the hard numbers of risk analysis to remind the client that the goal is not to insult the other side with overly emotional demands that are too high, but to select a number that signals an understanding of the potential damages, is consistent with or better than the walkaway alternative and to set aside emotions. Obviously, that is easier said than done.

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