

Damage Analysis Is Key To Settling Complex Cases

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In my 30 plus years of experience as both a commercial litigator and now a mediator of commercial cases, I find that many lawyers are well prepared to discuss the merits of the liability issues at mediation (e.g., what is the proper interpretation of the crucial contract provisions, who failed to comply with the contract and how), but not well prepared to discuss the complex damage issues, preferring to make broad-brush statements regarding damages but not able to explain the model or math behind the damages. Unfortunately, this is where many mediations bog down.



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An understanding of the damage model and the facts and figures to back it up is crucial to a successful mediation in commercial cases. This is true for both plaintiff's counsel and defense counsel. Most defendants are not going to roll over and pay substantial sums of money in settlement when they have not been presented with a cogent explanation of the damage model and seen the documents, facts and figures to back up the settlement demand. Likewise, most plaintiffs will not easily budge from their demand unless the defense is prepared to poke holes in the damage model and present facts and figures to rebut the plaintiff's claims. A thorough analysis of the damages prior to mediation is necessary for the plaintiff to honestly evaluate its potential recovery and for the defendant to honestly evaluate its potential exposure. To that end, what follows are a few suggestions to consider in preparing for mediation.

Retain a Damages Expert Early

You're going to need a damages expert, so get a good one early — before even filing suit if you represent the plaintiff. No matter whether you represent the plaintiff or defendant, your expert can guide you in gathering information and documents relevant to damages you will need to obtain from your client and the opposing party. If you represent the plaintiff and most of the relevant information is already in your client's possession, your expert may be able to provide you with a detailed damage analysis that includes backup documents even before discovery has been done. This, in turn, may enable you to mediate even before engaging in protracted and expensive discovery.

Send a Detailed Premediation Settlement Demand

Parties are less likely to settle a case when key information is presented to them for the first time at mediation. They simply do not want to make decisions based on information that they have not had sufficient time to review and evaluate. The best practice is to send a detailed settlement demand to

opposing counsel as soon as the necessary information is available. The demand should include a detailed explanation of the damage model and calculations and should provide the key documents that support the damages analysis. There is practically no downside to sending such a demand and providing this information well in advance of the mediation greatly enhances the chances of settling the case.

Consider Early Mediation

Even if one or both parties lack information necessary to evaluate the damages, early mediation should not be ruled out. If both parties are motivated to settle as soon as possible, an experienced mediator can assist the parties in formulating a list of documents that both parties agree to exchange prediscovery. After the documents are exchanged, plaintiff's counsel, with the assistance of the expert, should prepare and send the settlement demand described above if that has not already been done. Once defendant's counsel and expert have analyzed the demand, defense counsel should consider sending a response that responds to the damage analysis and provides any relevant rebuttal documents that have not already been exchanged.

Educate Yourself, the Client and the Mediator

Counsel should meet with the expert in advance of mediation to make sure counsel has a thorough understanding of the damage model and calculations and is prepared to answer questions about it. In addition, counsel should plan to bring a client representative to the mediation, such as a CFO or another member of the financial or accounting department, who is well acquainted with the damage analysis and underlying documents. Finally, the mediator should be given a copy of any settlement demands and responses, expert reports and relevant underlying documents. It is also extremely helpful to provide a confidential mediation statement to the mediator that discusses issues relevant to settlement that should not be disclosed to the opposing side.

Damages Should not be an Afterthought

In conclusion, parties are not likely to be successful in mediation if they treat damages as an afterthought. Especially in complex commercial litigation, attorneys will greatly improve their chances of settling at mediation and saving their clients money if they involve a good damages expert early, provide opposing counsel with a settlement demand that includes a comprehensive explanation of damages as soon as possible, make efforts to mediate early and educate themselves, their clients and the mediator about damages well in advance of the mediation.

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