



The Role of the Opening Demand at Mediation

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Most mediations begin with some introductory comments by the mediator and perhaps a round of questions to clarify the facts. At that point, the mediator will ask the Plaintiff for an opening settlement demand.

The opening demand is the kickoff for the mediation. Some opening demands are accompanied by a thoughtful damages analysis. Others appear to be pulled out of thin air.

Unfortunately, an opening demand that is perceived by the other side as exorbitant or overly aggressive is most often met with a counter offer that is equally offensive to the other side. This can quickly lead to a stalemate.

Some believe that the opening demand sets the tone for the entire day. In my humble opinion, the opening demand, no matter how offensive it is perceived to be, is just the beginning of a process where the final number is infinitely more important than the first. That said, it is up to the mediator to guide the parties through the process.

First, the mediator should try to soften the blow of an opening demand by delivering a positive message along with the demand. The mediator should help the parties understand that an opening demand is just the start of a process, and that the opening number will not be the final number. Indeed, significant movement (by both sides) will

not come until after the parties discuss the facts, evidence and other pressure points. In this sense, the opening demand is just the first mile in a marathon.

The mediator may also ask the demanding party questions designed to help understand the reasoning behind the opening demand. By understanding the factors weighing in the amount of the demand, the mediator may be able to get concessions from the parties later on in the negotiations. For example, a party factoring in a substantial punitive damages award in its opening demand may have to reconsider its position upon learning about the other side's limited financial resources.

On the flipside, a party factoring in a large emotional distress damages award in its demand may get concessions from the other side when it learns about the Plaintiff's serious psychiatric condition.

Some attorneys are reluctant to provide a breakdown of the opening demand because it may make it easier for the other side to chip away at the number. In my experience, a settlement demand that is thoughtful and based on sound reasoning is usually easier to sell to the other party.

Finally, a mediator may also need to explain to the demanding party (and his or her counsel) the negative consequences of making an opening demand that is likely to be met with hostility. It could be that the party making the demand doesn't intend for the other side to throw up its hands in frustration and stonewall the process, and this is exactly the type of message that the mediator should deliver along with the demand soften the blow.

Ultimately, an effective mediator can start building trust and credibility early on in the mediation by delivering the message that the first number is not the most important number, and that the parties should have faith in the process and let it play out.



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