Overcoming "Anchoring"

A Mediator's Empirically-Based Approach to Helping the Parties Make the Right Offer and Demand

BY PEGGY FOLEY JONES & DENNIS MEDICA

"This case will never settle." "I can get more at trial than what's being offered here." Sound familiar? I hear these statements every day from attorneys and parties during mediation sessions.

While the majority of cases I mediate settle, I often wonder why it takes an entire day to resolve a case. Yes, it is important that the parties discuss emotional, legal and other issues that are important to them. But too often, once the focus turns to the "numbers," the parties engage in unhelpful "anchoring" behaviors and waste a lot of time trying to get to a reasonable settlement range.After mediating over a thousand civil cases, I began to wonder about the correlation among the initial demands, offers and the ultimate settlement number. Are defendants right that plaintiffs' demands are "excessive"? Are plaintiffs right that defendants are making "low ball" offers?

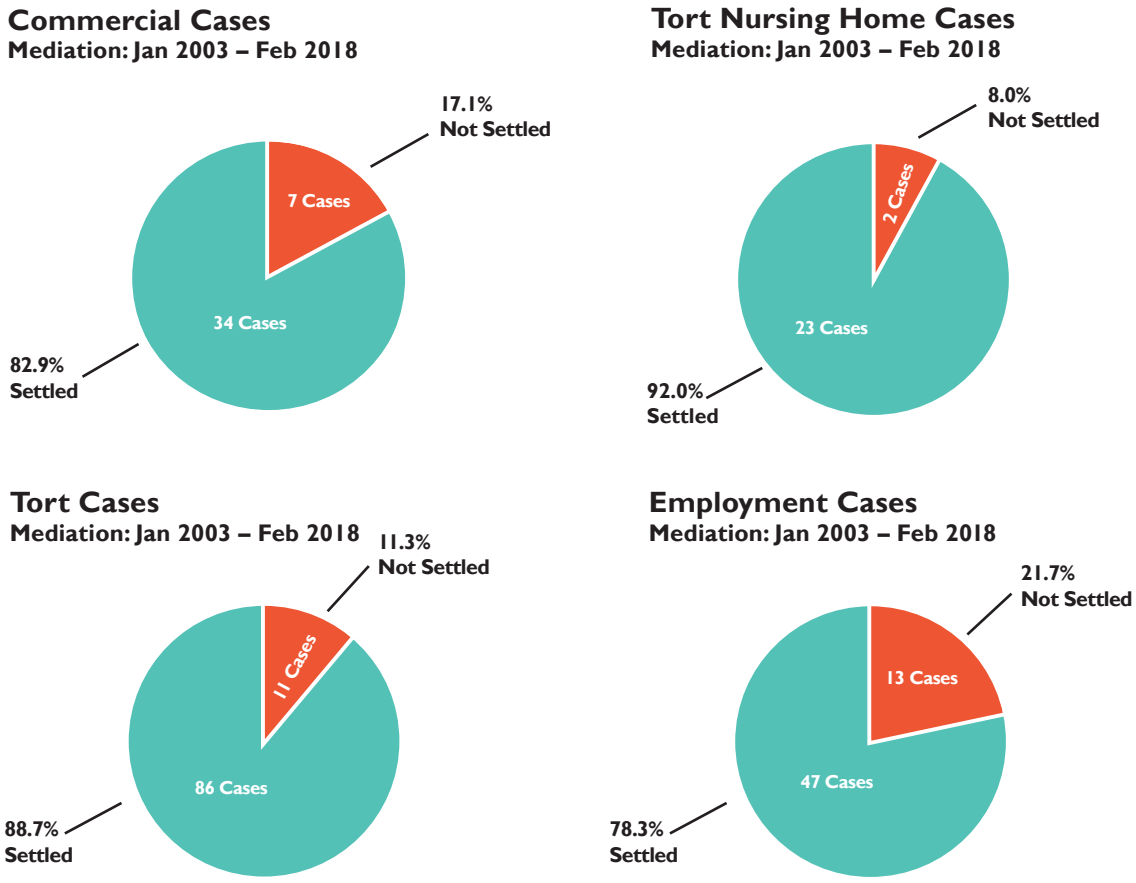
To try and answer these questions, I began tracking the initial offers, demands and settlement numbers on the cases that I mediated. My goal was to do an empirical analysis to determine the relationship between them and to use this information in assisting the Parties to overcome "anchoring" and positional bargaining early on in the mediation.

This article will examine: 1) the correlation between the demand and settlement amount; 2) the correlation between the offer and settlement amount; 3) whether the settlement percentage at mediation is higher for cases that were filed in court versus cases that were mediated pre-suit; and 4) the percentage of cases that settle in mediation.

A. METHODOLOGY

I reviewed the demand, offer and ultimate settlement amount for 223 civil cases I mediated from 2013 to 2017. Some of the cases were mediated pre-suit, but the majority of the cases had been filed in court. The cases were put into one of four categories: employment, tort (e.g. medical malpractice, product liability, car

Chart 1



	# of total cases	# of cases settled	% of cases settled	# of cases not settled	% of cases not settled
Commercial	41	34	82.9%	7	17.1%
Nursing Home Tort	25	23	92.0%	2	8.0%
Tort	97	86	88.7%	11	11.3%
Employment	60	47	78.3%	13	21.7%
	223	190	85.2%	33	14.8%

accident, and wrongful death cases), nursing home tort, and commercial. Dennis Medica, a CPA and Forensic Accountant, reviewed and analyzed the data in order to answer the four questions above.[1]

B. ANCHORING

Anchoring in decision making is a term used in Psychology to describe the common human tendency to fixate too heavily on one aspect of information when making decisions.[2] I have encountered varying degrees of anchoring behaviors during mediation; however, the parties are most likely to spend a disproportionate amount of emotional capital anchoring around the initial offer and demand.

C. ANALYSIS

1. Settlement rate. As predicted, a majority of the cases (85.2%) settled at the mediation.

As seen in **Chart 1,** the settlement rate varied somewhat according to the case type. Specifically, 92% of nursing home tort, 88.7% of tort, 82.9% of commercial and 78.3% of employment cases resolved at the mediation.

2. Relationship of Demand, Offer and Settlement

On average, cases settle for approximately one-third of plaintiff's demand and six times more than the defendant's offer. Specifically, as seen in **Chart 2,** commercial cases settle for 37% of the demand; tort cases settle for 36% of the demand; nursing home tort cases settle for 33% of the demand and employment cases for 32% of the demand amount.

Chart 2			
Settlement/Demand			
Commercial	37%	Range	6%–67%
Tort	36%	Range	5%–97%
Nursing Home Tort	33%	Range	17%–62%
Employment	32%	Range	6%–95%
Average Range 32% to 37%			

As seen in **Chart 3**, commercial cases and nursing home tort cases settle for 6.2 times the offer amount, torts for 6.1 times the offer amount and employment cases for 5.6 times the offer amount.

Based on the above results, demands are significantly closer to the ultimate settlement amount than are offers; however, this suggests that both parties need to reevaluate how they formulate their opening offers and demands.

3. Settlement by Venue

Surprisingly, pre-suit cases had the highest settlement rate at 90%, as compared to the cases filed in court. The second highest settlement rate occurred in cases filed in Summit County Common Pleas Court at 89.5%, then cases filed in United States District Court for Northern District of Ohio at 87.5% and finally Cuyahoga County Common Pleas Court at 85.5%. (**Chart 4**)

4. Less than 1% of cases are resolved via jury trial

When the parties are approaching an impasse during mediation, I ask them for their BATNA (Best Alternative to Negotiated Settlement).[3] A common response is "I'll take my risk and go to trial." While every party has a right to have his her day in court, only a small percentage of

Chart 3					
Settlement/Offer					
Commercial	628%	Commercial	6.3	Range	0.0-30.0
Nursing Home Tort	617%	Nursing Home Tort	6.2	Range	0.0-15.0
Tort	614%	Tort	6.1	Range	0.0-30.0
Employment	562%	Employment	5.6	Range	0.0-20.0
Average Range 562% to 628%			5.6-6.3		

Chart 4								
	# of total cases	# of cases settled	% of cases Settled	# of cases not settled	% of cases not settled		Settled	Not Settled
Pre-suit	30	27	90.0%	3	10.0%		90.0%	10.0%
ND-OH	16	14	87.5%	2	12.5%		87.5%	12.5%
Cuyahoga	69	59	85.5%	10	14.5%		85.5%	14.5%
Summit	19	17	89.5%	2	10.5%		89.5%	10.5%

cases actually go to trial. In the United States District Courts, for the 12 month period ending September 30, 2017, only 0.9% of the 236,270 civil cases resolved via court action went to trial.[4] For the United States District Court for the Northern District of Ohio, of the 3,674 civil cases requiring court action, only 0.5% of the cases reached trial.[5] Finally, for Ohio state courts, in 2016, of the 119,344 total civil case dispositions, only 0.3% went to a jury trial.[6]

Several years ago, I learned the eventual jury verdict entered in one of the cases I mediated that failed to settle. I realized that the jury awarded the plaintiff over five times more than the plaintiff's mediation demand and 143 times more than the defendant's mediation offer. I became curious about the verdicts in cases that proceeded to trial after not settling in mediation. I found the study below on decision error in unsuccessful settlement negotiations to be very informative. In an article written in the *Journal of Empirical Legal Studies* in September 2008,[7] the authors quantitatively evaluated the incidence and magnitude of errors made by attorneys and their clients in unsuccessful settlement negotiations. The study analyzed 2,054 California civil cases which proceeded to arbitration or trial after unsuccessful settlement negotiations. The study revealed that the incidence of decision error (receiving a less favorable result at trial than the other side's last offer) for plaintiffs is higher than for defendants, but the cost of the decision error is higher for defendants than plaintiffs. In the sample of cases, plaintiffs committed decision error in 61% of the cases. By contrast, defendants made a decision error in 24.3% of the cases. Nonetheless, there is a substantial difference in the mean cost of error between plaintiffs and defendants ($43,100 and $1,140,000). The study concluded that, given the relatively large discrepancy between the parties' mean cost of error; it is not surprising that the expected cost of error is greater for defendants by a factor of 10.[8]

D. IMPLICATIONS FOR PRACTICE

This analysis taught me several things. Foremost is that most cases settle rather than fail in mediation. Also, on average, monetary settlement amounts are closer to the plaintiff's initial demand than the defendant's initial offer. And as noted in the *Journal of Empirical Legal Studies* article above, plaintiffs received jury awards less than the defendant's last offer in 61.1% of the cases, while defendants paid more than plaintiff's last demand in 24.3% of cases. However, the magnitude of defendants' errors vastly exceeded that of plaintiffs' errors.

Finally, "anchoring" around the initial offer or demand causes distress, mistrust of the opponent, and makes for a long day. A mediator can diffuse "anchoring" by having the parties create a reasonable settlement bracket which will inoculate them from taking overly high positions that make it harder for them to descend in order to make a deal. Traditionally, mediators were taught to use the bracket as a last resort to save mediation. But why wait? Mediators can be proactive in getting the parties into the right frame of mind (especially by mitigating anchoring) and encouraging them to develop a more collaborative spirit. A new approach will, in my experience, make mediations shorter and more successful.

[1] To protect the confidentiality of the parties and the attorneys pursuant to the Uniform Mediation Act/Ohio Mediation Act, Mr. Medica was only provided the type of case, venue, offer, demand, and, if the case settled, the settlement amount.
[2] *See, e.g.*, Andrea Caputo, *A Literature Review of Cognitive Biases in Negotiation Processes*, 24 Int'l J. Conflict Mgmt. 374, 379 (2013).
[3] "BATNA" is a term coined by Roger Fisher and William Ury of the Harvard Program on Negotiation in the 1981 book *Getting to Yes: Negotiating Without Giving In.*
[4] U.S. District Courts – Civil Case Terminated, by District and Action Taken, During the 12-Month Period Ending September 30, 2017, http://www.uscourts.gov/sites/default/files/data_tables/jb_c4a_0930.2017.pdf
[5] *Id.*
[6] Ct. Stats. Project, www.courtstatistics.org (last visited May 31, 2018).
[7] Randall L. Kiser et al., *Let's Not Make A Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations,* 5 J. Empirical Legal Stud. 551 (2008).
[8] *Id.* at 566.

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GREETINGS & SALUTATIONS

MAKING THE MOST OF THE OPENING SESSION

BY MATT MENNES

Mediation of civil disputes is as popular as ever. In Common Pleas Courts throughout Ohio, including Cuyahoga County, the vast majority of civil mediations begin with an opening joint session: parties, counsel, adjusters, and the mediator sitting together in the same room. As such, you may wonder how to make the most of the opening joint session. How much should you say? What tone should you set? Should your client speak? What will the other side say? Undoubtedly these and other questions will cross your mind. The purpose of this article is to help you make the most of the opening joint session. Disputes are not resolved based solely on opening statements, but an effective joint session does set the stage for productive negotiations and ultimately for resolution.

Greetings and Salutations

The first purpose of a joint session is to greet the other side: to put faces with names. At a minimum, counsel and the parties should introduce themselves to the other side with a sincere and cordial hello. First impressions matter, and I am always amazed when a mediation participant tells me hours into the mediation how offended they are that the other lawyer didn't even bother to say hello. There are enough barriers to settlement in mediation, so why create another by ignoring the basic courtesy of greeting the other side? Exchanging pleasantries about the weather, sports, or traffic begins to establish a rapport that can set the stage for later negotiations. Astute negotiators recognize that the parties are bound together in this litigation, and to reach resolution and craft a settlement, they will need to work together.

The Mediator's Opening

Most mediations begin with the mediator addressing housekeeping matters, introducing their mediation process, and discussing confidentiality and privilege. A mediator's opening remarks vary in style and duration, but they all have one thing in common: it's the mediator who does the initial talking. While this gives you and your client some time to gather your thoughts, it would be a mistake not to listen to the mediator. Besides learning important details like where the bathrooms are located, listening to the mediator gives insight into that mediator's style and preferences. What tone are they setting? Do they project confidence and optimism? Are they managing expectations? Are they clear about confidentiality? When will we caucus? Listening to the mediator's opening remarks provides useful information that can help counsel decide how to effectively use the mediator later when the negotiations hit the inevitable rough patches.

Counsel should also encourage their clients to listen to the mediator. This gives your client a chance to learn about the mediator and their mediation process. This also gives the mediator a chance to establish a rapport and to build trust with your client. If you have accurately described mediation to your client, then the mediator's opening remarks also reinforce your client's confidence in you and your settlement recommendations. It can also be useful to refer back to the mediator's opening remarks later in the process if a client needs reminding about the purpose of mediation and the importance of compromise.

Counsel's Opening Remarks

Mediation advocacy is not trial advocacy. Prepare your client in advance so they know the difference. There is no jury or judge to convince in mediation. The goal of an opening session is not to convince the other side that you are right and they are wrong. There is plenty of time later in the process for the mediator to help both sides evaluate strengths and weaknesses and appreciate risk. If your client is still confused about why your mediation advocacy feels different than what they expect at trial, the mediator can help explain the difference.

The opening session is an opportunity to establish a rapport and start to build credibility with the other side. Finding areas of agreement and common facts, identifying areas of disagreement, and even acknowledging some of your own risk goes a long way towards establishing credibility with the other side. That credibility can be invaluable down the road when negotiations inevitably hit an apparent impasse. A scorched-earth opening statement can cause the other side to reactively devalue everything you say after that. On the other hand, a firm but fair opening will lend credibility to arguments you make later in the mediation. You are unlikely to convince the other side with an overly adversarial opening statement, but you do run a very high risk of causing them to become further entrenched. A lawyer's opening statement should demonstrate that they are prepared

and knowledgeable about the case, but also that they acknowledge the costs and risks inherent in trial. Counsel can dial the advocacy up and down as appropriate, but shouldn't forget the primary purpose of the mediation opening session.

It is also important to identify your audience. Is it the other party? The mediator? Opposing counsel? Your own client? All of the above? Opening statements in mediation provide the rare opportunity to address the other party directly, without the filter of opposing counsel or the mediator. It is a chance to tell them directly that there are alternative points of view, and therefore risk. However, it is not the time for personal attacks. Calling someone a liar will frustrate the mediation process. Any concerns about a client's credibility should be addressed in private caucus with the mediator. Some of the most effective opening statements simply acknowledge that the parties don't agree about certain things, while stating that they are here today to compromise and seek common ground.

Your Client's Opening Remarks

Allowing your client to speak in mediation offers insight into which aspects of their claim are most important to them. Lawyers are very good at articulating legal positions, but the clients themselves are often best at identifying their underlying interests. Further, sometimes clients present new information in their opening remarks. I am always amazed in a personal injury case when a lawyer learns for the first time in mediation that their client has recently gone back for more medical treatment, or that their property damage claim was never resolved. Because so few cases go to trial, mediation is also your client's opportunity to have their "day in court." Telling their story, and feeling heard and understood clears the path for resolution. Allowing your client to speak in mediation also gives you the opportunity to asses them as a potential witness. How do they present? Are they articulate? Will they have jury appeal? Do they present differently at mediation than at their deposition? What is their comfort level in the courthouse and what is their risk tolerance?

The Other Side's Opening Remarks

Most mediators ask plaintiff's counsel to speak first. Others invite the parties to decide who goes first. Whether you speak first, second, or last, you will have the opportunity to listen to the other mediation participants. Listen to opposing counsel. How well do they know their case? Their client? Which facts and legal arguments are they emphasizing? Are they setting the stage for negotiation and compromise, or are they attempting to litigate in their opening statement? As for their client, what kind of witness will they make? Does their appearance match their demeanor at deposition? Do they emphasize the same points as their counsel? If not, what aspects of the case seem important to them? Above all else, listening to others in the joint session is an opportunity to learn invaluable information to help you advise your client about settlement later in the mediation process.

Conclusion

Cases are not won or lost in the opening joint session. Instead, an effective joint session sets the table for productive negotiation, and often reveals invaluable information to those who listen. While it is important to prepare your opening remarks, astute readers will notice that a majority of the topics above involve listening, not talking. There is an old saying that is often repeated in mediator circles that we humans have two ears and only one mouth for a reason. Counsel and their clients become so focused on what they are going to say at mediation that they often forget to listen. Remember, the goal of the opening session is not to convince the other side, but rather to establish a rapport and start to build credibility that you can use later in the process. Being respectful and listening with the goal of learning something new about the case will lead to more productive mediations and better results for your client.

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Overcoming Anchoring and Impasse

Peggy Foley Jones
Douglas Godshall
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The Supreme Court of Ohio 2020 Dispute Resolution Conference

Barriers to Settlement

Anchoring

- Fixating on one aspect of information when making decisions

Impasse

- Negotiations come to a standstill

Anchoring

"A Mediator's Empirically-Based Approach to Helping the Parties Make the Right Offer and Demand"

By Peggy Foley Jones

Cleveland Metropolitan Bar Journal, July/August 2018

Impasse

Is it real or perceived?

Techniques

- Bracketing
- Mediator's Proposal
- Mediator Suggests a Range

Mediation Core Values

- Self-Determination
- Neutrality
- Impartiality
- Confidentiality
- Fairness of Process

Bracketing

- Employment mediation: Plaintiff alleges discrimination and retaliation.
- After several hours, the plaintiff's demand is $600,000 and the employer's offer is $50,000.

http://www.ohiochannel.org/video/demonstration-of-mediation-bracketing

Mediator's Proposal

- Personal injury mediation: A significant motor vehicle accident with permanent injuries.
- Plaintiff's last demand is $800,000. The last offer from tortfeasor's insurance company is $165,000.

http://www.ohiochannel.org/video/demonstration-of-a-mediators-proposal

Mediator Suggests a Range

- Breach of contract dispute between two commercial parties.
- After hours of mediation, plaintiff's demand is $1,000,000 and defendant's offer is $500,000.

http://www.ohiochannel.org/video/demonstration-of-a-mediation-range

BATNA

- Best alternative to a negotiated agreement.

  http://www.ohiochannel.org/video/batna-first-demonstration

  http://www.ohiochannel.org/video/batna-second-demonstration

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