Torkin Manes
Barristers & Solicitors

VALERIE EDWARDS
MEDIATION BULLETIN

Why Opening Offers Matter

Everyone has experienced a mediation which feels like death by a thousand cuts. By this I mean the tedious process of endless offers, each reflecting only a little more compromise than the last, and ultimately resulting in hungry stomachs and a late night settlement.

Well, maybe a late night settlement. It is just as likely that the mediation breaks down by noon, with each side concluding that the other did not come prepared to bargain in good faith.

The opening offer usually sets the stage for the negotiations, but parties typically don't come to the mediation having thought out, in advance, what a principled opening offer might be. Interestingly, this doesn't prevent litigants from declaring their "bottom line" at the very outset, and it is usually a very unrealistic number. And if the lawyer has not wrapped her mind around the case and embarked on her own assessment of risk, it is often difficult for the mediator to secure a reasonable opening offer to take in to the defendant.

The problem is sometimes compounded by a lawyer's lack of confidence in negotiation. Defendant's counsel may be inclined to start with a lowball offer, for fear that a higher offer will be a sign of weakness – a slippery slope, so to speak - which he and his client obviously wish to avoid even though they know the case should be settled, and not for a nominal amount.

And what if one side has concluded ahead of time that the mediation is a waste of time? How often have you found yourself saying something like: "the plaintiff is a nut, and her lawyer can't control her" or "the defendant's a crook and his lawyer is a maniac, no one can deal with them", or variations on the theme? A "highball" or "lowball" offer reinforces the pre-existing expectation that the mediation will fail and often results in a very short day. But the truth is that only a small percentage of "crazy" clients actually go to trial, and most lawyers – even those perceived as "maniacs" – are usually reasonable when push comes to shove.

The mediator's challenge is persuading the parties to make opening offers that reflect a spirit of compromise. Some mediators just shuttle offers back and forth and do not believe it is their role to offer feedback on the offers before they are communicated. This in my view is a mistake. If the plaintiff, for example, proposes an offer which I feel is overambitious, I say so. I explain that the defendant is unlikely to respond to the offer, or will offer something so low that the mediation is going to go nowhere. I will firmly suggest that the plaintiff consider making an offer that implicitly acknowledges at least some risk. In most cases, the plaintiff will lower their offer accordingly.

If I have a reasonable opening offer from the plaintiff, I'm in a much better position to persuade the defendant to go back with a decent response. In a case where it is the defendant who has come to the mediation with a defeatist attitude, a principled opening offer from the plaintiff comes as a surprise. The dynamic immediately shifts to: "Well, maybe we can get something done today after all". This defendant is less likely to attempt a lowball counter-offer, or will be more amenable to some stiff pushback when I suggest that a nuisance offer is a non-starter.

If a party is still determined to make an unreasonable opening offer, I will of course carry the offer into the other room and explain the rationale for it if there is one. Unfortunately, the receiving party is usually so focussed on the "insult" that he or she is not receptive to hearing the other side's explanation, and won't budge. This dynamic can force a mediator into a premature debate about the merits which would normally take place deeper into the mediation, once the mediator has earned the confidence of the parties. If the mediator expresses an opinion too early and too vociferously, his credibility is often destroyed and so is the mediation.

The longer the negotiations stay on the rails, the less likely they are to fall off the rails. Principled opening offers help ensure that both parties start on the same set of tracks and are heading in the same direction. This makes for more successful – and shorter – mediations. ♦

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Valerie Edwards is a partner of Torkin Manes LLP and is a highly respected member of the litigation bar. In addition to her extensive experience as trial counsel, she has appeared as lead appellate counsel in both the Ontario Court of Appeal and the Supreme Court of Canada.

Specific Expertise

- Alternative dispute resolution (listed in the 7th edition of Best Lawyers in Canada)
- Damages quantification, including business loss claims, business and share valuations, and real property valuations
- Shareholder and partnership disputes
- Professional liability claims involving lawyers, realtors, brokers and accountants
- Real estate and mortgage disputes
- Employment litigation, including departing employee lawsuits
- Class proceedings
- Commercial disputes, including commercial tort claims
- Claims against directors and officers
- Insurance law and insurance coverage disputes