



What to do when the settlement numbers you put on the case are miles away from the defense perspective

This story is for you if . . .

- Your pre-mediation demand is high;
- The other side will not respond to your demand;
- You need a way to engage the other side.



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The problem

You have made a demand that is so high that your adversary will not respond. You want to settle for substantially less than your demand, but you also do not want to leave anything on the table. In essence you have boxed yourself in and need to find an exit strategy.

The solution

Allow the mediator to give the other side a piece of information about your case that infers a more realistic range of settlement. For example, you can work hand in glove with the mediator by helping him come up with a strategic talking point or comment that infers a “softness” on one of your issues, such as loss of earnings or future need for surgery. This talking point can specifically be designated to “come from” the mediator as his impression of the case, though you will have assisted in its development. By floating a trial balloon in a lower range based on the talking

point, it allows the mediator to diagnose whether the other side is receptive to a more realistic negotiation.

Always accept the fact that the other side might start with a low end offer which is in direct response to your extreme demand. They generally (but not always) have an obligation to do this as they will likely have to report to a supervisor who will be critical of their first move if it is too high. Once the low-ball offer occurs, the mediator can help you bridge the gap through a variety of tactics including joint bracketing, which can occur by one side suggesting a range and the other side responding with their own range, or simultaneous bracketing in which both sides confidentially give the mediator a range that cannot be discussed with either side but which allows the mediator to propose his own range. There are numerous variations on this theme, but it requires both sides to reveal to the mediator more information about their ultimate objectives early on than what normally occurs in a typical negotiation.