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SEPTEMBER 2011



What did you just say?

How to take charge of your negotiations to communicate what you really mean (and want)

By Barbara Brown

In my mediation practice, where the negotiation is about money, which it usually is, I regularly hear these reactions to offers I am carrying:

"That's insulting. I'm not even going to respond to a number like that."

"They're just wasting my time."

"They're not here in good faith."

"I'm not going to bid against myself."

"Tell them they have to go first."

"We've got to send them a message."

The mediation of civil trial court litigation is usually about money. What starts with a discussion of facts and liability soon gives way to traditional positional bargaining, with the mediator carrying numbers back and forth, trying to keep the parties calm and optimistic as they react to the offer that has just been delivered and formulate offers to respond. Parties and their attorneys alike can become so tired, frustrated and angry that they put an end to the negotiation even before they reach their bottom line. This is usually not a satisfying process for anyone involved, except for the relief everyone feels if and when the case does eventually settle.

So it was with great interest that I read J. Anderson Little's Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes, published by the American Bar Association in 2007. In this gem of a book, Little examines how parties communicate in a negotiation about money. His thesis is that monetary proposals which go back and forth are a form of communication, the subject of which is the range in which settlement can take place. Because the communication is indirect (nobody is going to tell the other side straight up what they will settle for), the parties can unintentionally miscommunicate and mislead each other. They negotiate reactively, responding out of frustration or anger to the other side's proposals rather than thoughtfully moving the negotiation forward into their own target range.

Little wrote his book for mediators. My purpose in writing this article is to bring his approach to advocates, who can benefit from it in their mediations. With the help of a thoughtful mediator, they will find it an even greater advantage.

Consider this scenario used by Little in his book:

Plaintiff has evaluated his case at $35,000 to $50,000, $35,000 being his bottom line and $50,000 being his best day in court. He opens the negotiation with a demand for $100,000, on the theory that he can't get to his settlement range if he doesn't start high.

Defendant has evaluated the case at $15,000 to $30,000, thinks $100,000 is ridiculous, and therefore counters at $2,000.

Plaintiff, furious at the lowball offer, counters at $98,000.

This scenario is all too familiar in the negotiation of monetary disputes. Plaintiff's opening demand is much higher than his own case analysis supports. Defendant hears the message that the settlement ballpark is much higher than he can or will pay. In an effort to pull plaintiff down into defendant's own range, defendant sends the lowball offer of $2,000. What plaintiff hears, however, is that defendant is unwilling to pay anything near what the case is worth and to make defendant get serious, sends back a counter offer of $98,000. Both parties have thus miscommunicated what they believe to be the appropriate range for settlement. As a result, they are likely to give up in frustration or walk out in anger when in reality their bottom line numbers are only $5,000 apart (Little, pp. 67-68).

To avoid this, Little urges negotiators to focus on what they themselves can do to make progress toward settlement (Little, p. 92). In preparation, negotiators must first thoroughly analyze and evaluate their case, and then develop a plan for the negotiation process which allows them to communicate to the other side what they see to be the appropriate range for settlement.

Analyze and evaluate your case

Your case analysis of course begins with information, the facts – on both sides of the case. You have to marshal not only your own facts but the information from the other side as well. Beyond complying with the demands of discovery, you also have to decide what information to release to the other side. Although the release of information is often a strategic decision, and you may want to withhold certain information for trial, you nevertheless have to provide ahead of time, or be prepared to provide at the mediation, enough information to legitimize your claim (Little, p. 38). It is obviously not persuasive to take a negotiating position for which you can show no support.

When you have marshaled the facts and applied the law to them, you are in position to analyze the strengths and weaknesses of your case and assess its value. This analysis provides the framework for your negotiation; if you don't know the value of your case, you don't know what offers to make or accept. To arrive at the value of your case, you must be able to answer the basic questions: what is the likely monetary result of going to trial; what are your chances of achieving that outcome; what does it cost you to

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obtain that outcome; and what are your chances of collecting a judgment if you get one (Little, p. 49). Although ultimately the evaluation should always be yours, not that of the mediator, the mediator may be of great help in working through these issues.

Develop a plan for the negotiation process

The point of the negotiation of a litigated case about money is to try to reach a mutually acceptable settlement. To do that, the sides have to communicate to each other their respective ideas of what an acceptable settlement range is. In the scenario above, plaintiff's settlement range is $35,000 to $50,000 and defendant's is $15,000 to $30,000; yet what they communicate to each other is not even close to this. Proposals such as theirs, formed out of anger and frustration, do not send clear messages.

Little was intrigued in his mediation practice by the regularity with which negotiators reacted emotionally to an offer from the other side and then responded in kind. He theorizes that settlement proposals are a form of communication; each side wants to "send a message." The subject of this communication is the range in which settlement can occur. But parties often "send a message" that directly contradicts what they really want to say. He outlines this reactive approach as follows:

I don't like how they moved.

I want them to move closer to me and get into my range of settlement.

So, I will make a small move myself to show them I'm serious and that they need to come toward me. (Little, p.76)

The resulting small move, however, actually discourages movement toward settlement rather than encouraging it. This is because "movement begets movement." "The irony of money negotiations is that a party has to make movement toward his opponent in order to get his opponent to move toward him." (Little, p. 76)

When negotiators respond emotionally to the other side's offers, they have in effect taken their eye off the ball and run the risk of delivering their own miscommunication about settlement range. Rather than reacting reflexively to an offer, Little proposes having a plan ahead of time for how you will move through the negotiation.

What Little means by developing a plan for negotiations is first answering the following questions:

After I have reviewed my case,

After I have decided what I get on a good day and on a bad day in court,

After I have factored in all of the costs and contingencies,

After I have conducted a thorough case analysis,

After all of that,

At what number will I start the negotiation?

At what number will I walk away from it?

How will I move from number to number in between? (Little, p. 77)

Your starting number should be clearly supported by your case analysis. In the scenario above, plaintiff's own evaluation was that the best he could do at trial would be $50,000; yet he opened the negotiation with $100,000, a number for which he had no support at all. Defendant, on the other hand, had determined that he would get hit with at least $15,000 at trial; yet he reflexively countered with $2,000. To communicate to each other their respective perceptions of appropriate settlement range, plaintiff should have opened with a number much closer to $50,000 and defendant should have countered with a number much closer to $15,000.

Your initial walk-away number should be the point beyond which your analysis has told you it is worth taking the risk of going to trial. This number is of course subject to change during the course of the mediation. You may learn new facts, change your perception of existing facts, or generally change your evaluation of your own or the other side's case. Your initial bottom line, however, along with your starting number, will frame your negotiation plan.

The possibilities for a plan for movement from number to number in between are virtually limitless, but one Little sets out is this: proceed by dividing up the available range for negotiation into a number of equal increments. Let's say the plaintiff has determined that his settlement range is $50,000 to $100,000; that is, the best he can do at trial is $100,000, and his walk-away number is $50,000. He might divide the $50,000 range into eight increments or moves of $6,250 each. Plaintiff's moves – irrespective of defendant's counters – would thus be $93,750, $87,500, $81,250, $75,000, and so on. At any point in this process, plaintiff could reevaluate and divide the available range into smaller equal increments to signal that he was getting near the end of the range (Little, pp. 81-82).

What if you *don't* want to communicate your target settlement range to the other side. What if you want to make the other side think the range is higher (or lower) than it is, to pull the other side more in your direction? Little would say this is precisely the misguided approach for which he has written his book. Misleading the other side about where your settlement range actually is can lead to frustration and anger as well as squelch the possibility that the negotiation process will result in best numbers on the table. Moreover, Little would say, again, that misleading about the target settlement range, making small moves, does not draw the other side to you but actually has the opposite effect.

What if the other side does *not* respond favorably to your thoughtful, planned moves? What if you march forward with regular concessions, and the other side is *not* drawn toward your settlement range? If your plan is not working, you can of course always change it. As the negotiation proceeds, even in the best of circumstances moves will become smaller as parties close in on their best numbers;

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as set forth below, they will then know what their real gap actually is. The point is to have a plan to start with – to be in charge of your negotiation and not react reflexively to the other side's proposals.

Bridging the gap

So far we have been talking about a planned negotiation to get each side to its best numbers. When those best numbers are reached, the real gap between the parties may be much smaller than anticipated. And when that real gap is known, many cases will actually settle (Little, pp. 75, 190). Whereas parties may be reluctant to continue moving if they believe that even if they get to their best numbers the case won't settle, parties who do get to their best numbers often discover that they are not that far apart and then see the negotiation in a new light (Little, p. 75). "So, while movement breeds movement, proximity of the parties' best numbers breeds settlement." (Little, p. 75)

The negotiation that bridges the gap between the parties' bottom lines is often experienced by the parties as a new, second negotiation (Little, p. 192). Parties often at that point can re-energize, relax their best numbers, and become more creative. The gap can sometimes then be bridged when parties call their supervisors, letting them know the progress that has been made and the size of the gap. Sometimes parties come up with solutions they hadn't thought of before, or the attorneys get together and find a solution, or the parties accept a midpoint, or the mediator makes a proposal. When the parties know that a bit more effort can actually bridge the gap, they usually are willing to stretch to make it happen (Little, p. 193).

When the currency of settlement is money, analyze and evaluate your case, plan your negotiation, and then draw the other side into your settlement range by communicating with your negotiation moves about where that settlement range is. Don't respond to settlement proposals reactively and reflexively. Rather, ask what you really want out of the negotiation and then negotiate in such a way as to get it.


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