The Price of Admission

By Hon. Sunil R. Harjani

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The views and opinions expressed in this column are those of the author and do not necessarily reflect the views or positions of any entities he represents.

As a federal magistrate judge, I conduct multiple settlement conferences each week. Over time, I have learned that there is a perception among lawyers that an opening settlement offer should be as aggressive as possible to demonstrate to the opposing side a certain strength and resolve in their case. Thus, I will often get an opening offer that is way out of range, or an opening counteroffer that values the case at almost nothing. The intended idea, of course, is to demonstrate that the case is extremely valuable or worthless, depending on whether counsel represents the plaintiff or defendant. Attorneys often believe that an aggressive opening posture will set the tone for the conference and thus result in a more favorable settlement for the client.

In other circumstances, I have learned that lawyers make wildly out-of-range opening offers or responses because they do not trust the other side. In those cases, there is a fear that a reasonable settlement offer will result in an unreasonable response, and thus place the first party in a disadvantageous situation. Conversely, it is easy for an unreasonable counteroffer to be issued following an unreasonable opening offer—resulting in both opening positions being out of range. Hence, largely for these two reasons, I often see cases that should start at reasonable settlement ranges begin with outrageously out-of-range offers and responses.

From my perspective as a judge-mediator, I see almost no value in making extremely high or low offers in mediations. Rather than demonstrate strength to the judge-mediator, it demonstrates unreasonableness and immediately diminishes credibility. It shows the judge-mediator that the attorney has not properly valued the case by assessing the evidence, costs of litigation, time to resolution, and uncertainties surrounding anticipated dispositive motions or a jury trial. It also shows that counsel has not valued the case with the clients' real interest in mind, which may be ending a dispute with a current employer, needing funds to support living or business expenses, or moving past an emotionally difficult set of circumstances alleged in the lawsuit.

What really happens when one side makes an unreasonable offer or response? It actually puts the other side's guard up. An unreasonable opening offer from a plaintiff often results in an equally unreasonable response from a defendant. An unreasonable response from the defendant causes the plaintiff to feel like their claim is not being taken seriously. With both the judge-mediator and opposing counsel, it fails to develop credibility and trust, show an open mindset, and demonstrate good faith—all traits that are needed for a successful settlement conference.

So, what do I do when I get wildly unrealistic offers and responses?

The easy option is to cancel the settlement conference. Judges often have multiple settlement conferences each week, and it is certainly efficient to focus on those cases where the parties have demonstrated a true interest in settlement with their reasonable offers and responses. Another option is to require each party to revise their offers based on the judge's feedback, which may result in some decent movement, but more often results in a minuscule new move by each party. Still another option is to hold the settlement conference despite these opening numbers and let the negotiations play out. That, of course, is a tactic that many judges use, and they let the chips fall where they may at the conference.

A fourth option, and one that I sometimes use, is called the price of admission strategy.

Price of Admission Strategy

The price of admission strategy consists of processes and conditions that I deploy before setting a settlement conference. If my ultimate conditions are not met, I do not hold a settlement conference with the parties.

After receiving the parties' settlement letters, with the wildly out-of-range offers and responses, I schedule a phone call where I have both joint and private sessions with counsel for each side. In the private sessions, I ask a lot of questions about their (1) statement of facts; (2) responses to factual and legal challenges identified in their opponent's settlement letter; (3) itemization of damages; (4) methodology in reaching an opening settlement number; and (5) mindset and willingness to negotiate and compromise.

Also, in the private sessions, I ask counsel to confide in me and provide me a better sense of how the negotiations would proceed in a conference. For example, if the opening demand was $2 million and the response offer was $20,000, I would pose a hypothetical to the plaintiff's counsel as follows: "Can you envision a world in which your client settles in the six figures?" In other words, I am asking counsel if there is any possibility, that her client could live with a settlement between $100,000 and $999,999. To the defendant's counsel with the $20,000 offer, I might ask the same question, "Could you see a world in which your client settles in the seven figures?" I would then push further, depending on the answer, and ask about a six-figure settlement.

Another hypothetical I would ask plaintiff's counsel is the following: "If I told you that no matter what I do, I could not get the other side to offer above $1 million, would you suggest going forward with the conference or canceling?" I would then ask a similar question to the defendant using different numbers.

I employ the above process to obtain a better sense of the true negotiating range and the party's resolve to settle the case. I ask counsel the specific questions above in order to come to my own conclusions about what a reasonable settlement range should look like. I also ask hypotheticals to counsel to obtain intelligence about where they see the negotiations really heading, given that their opening offers were driven by bad strategy rather than a true settlement value of the case. To be clear, I do not ask for bottom-line numbers, and I also do not believe that any counsel or client should come to a settlement conference with a bottom line—those are pre-conference formulations without the input of the neutral judge-mediator and without any consideration of how the negotiations will play out. This is the reason I ask hypotheticals and phrase the question with broad terms that allow counsel to continue to advocate for the best result for their client while keeping an open mind as to where the negotiations might end. With these questions in a private session, I expect truthful responses. I warn counsel that if they can't be frank with me, they may do a disservice to their client because their client may not get a settlement conference with the court. And I consistently promise that I will keep their confidences and that my credibility and effectiveness as a mediator rests, in part, on my ability to keep those confidences.

Prior to or after those private sessions, I also conduct research on jury verdicts and reported settlement figures for similar cases to achieve a better sense of the settlement value of a case. In addition, I have my own set of experiences that inform settlement values from past cases that my colleagues or I have mediated and settled in our district. Those factors also help me determine a more reasonable range for settlement discussions.

Once I have probed and poked both sides for information and processed my own research, I formulate a settlement negotiating range. In a joint session on the phone with the lawyers, I present the price of admission to a settlement conference with me. In the earlier example, I would inform counsel that in order to go forward with a settlement conference, the plaintiff has to agree to start the negotiation at $700,000 and the defendant has to agree to start at $200,000. This means that those numbers will be the new preconference opening numbers and that I expect the parties to negotiate from those starting points and continue to move numbers from there during the conference. I also warn counsel that the plaintiff should not expect to settle at $690,000 and the defendant should not expect to settle at $210,000. Rather, each side should have room to move at the conference. I emphasize that they should not look at the midpoint between $700,000 and $200,000 as the target settlement number because there is much work that the parties and I need to do at a conference, including further discussion of the challenges in the case, the cost of litigation, the time and work left before the conclusion of the litigation, other needs and interests of the parties, and nonmonetary terms in settlement, in order to properly assess a fair and reasonable settlement value of the case.

In explaining the price of admission to a settlement conference, I explain my rationale for the range to both sides without revealing any information that was provided to me in confidence. I often tell counsel that, as a neutral with no stake in the conflict, I have provided an honest and balanced assessment of the case and its settlement value, which is partly why counsel often seek out a magistrate judge for a settlement conference in the first place. I also inform counsel that, if they wish, I am happy to have another call with their clients to explain my rationale on the price of admission.

As shown in the above example, I try not to set the range too narrow or too broad. Too broad of a range does not achieve the goal of this process, which is to get the parties into a realistic negotiating zone, and essentially provides too big a gap to make any significant progress at a settlement conference. If the range is too narrow, I run the risk of scaring away one side as well as hampering counsel's ability to negotiate a settlement and manage her client. So, I strive to find a range somewhere between those two extremes. Note, I also do not simply formulate a range around the midpoint between the two initial opening offers (which, in my example, would center a range around a $1.01 million midpoint [$2,000,000 + $20,000)/2]). That would be a disservice to the parties unless it was justified by the different criteria that I considered, as described above.

To ensure neither side is prejudiced, I ask each side to send me a private email, without copying opposing counsel, letting me know if they agree to my range. I tell each counsel that I will only reveal their responses if I receive affirmative answers from both sides. If one side declines, I do not reveal any information and simply state on a docket entry that the parties have not unanimously agreed to the conditions for having a settlement conference with the court. In other words, the price of admission has not been satisfied. This "blind" process has the advantage of ensuring that one side does not give up their prior opening position without the other side doing the same. I also expressly inform counsel that my range is not up for negotiation and they cannot propose new ranges to me. I simply want a "yes" or a "no" response, after consulting with their client, usually within one week.

Finally, informing the parties that the range is the price of admission for a conference with the court requires the parties to start taking a hard look in the mirror. No longer is the settlement conference a "let's see what happens" event. Nor does it allow the conference to become a series of small moves coupled with the usual venting about the other side's unreasonable position. Rather, counsel and their client now have to commit to a serious settlement process and ask themselves if they really want to resolve the case without further litigation. If they decline the range, they will no longer have a judge-mediator to assist with their negotiations, making a future settlement even more unlikely.

What Is the Result?

If I have asked the right questions and processed the information correctly, I have confidence that I have reached the appropriate range

and will get two affirmative responses. Two affirmative responses have now substantially increased the chances of reaching a settlement and narrowed an unreasonable preconference gap as follows:

	Plaintiff	Defendant	Gap
Initial Offers	$2,000,000	$20,000	$1,980,000
New "Price of Admission" Offers	$700,000	$200,000	$500,000

In my example, the gap has narrowed from $1.98 million to $500,000. Beginning negotiations with this range set prior to a conference is substantial progress and saves an enormous amount of time at a formal settlement conference. I have also firmly clarified that any settlement reached at a conference will be a six-figure settlement. The odds for reaching a settlement are now much higher.

If I get one declination, then there is no settlement conference and the parties go back to litigation. I realize that there is a certain momentum that can occur in negotiations and that by receiving a declination from at least one party, I have given up the option, as lawyers like to say, to use my "magic" to make something happen at a conference. In response, and in jest, I generally reply that my magical powers, if any, are limited and that the real magic will only happen within the price of admission range.

On a more serious note, a declination from one or both parties tells me that the odds of settlement at a conference are very low and that I have saved the parties (and myself) the time and cost of proceeding with a lengthy conference that will likely not result in a settlement. Certainly, there is some value that comes with an in-depth discussion of the case with the judge-mediator at a conference, as well as with the direct mediator-client conversations that occur at a conference. I recognize that, even if a conference is unsuccessful, those conversations can pave the groundwork for the parties to reach a settlement on their own or a successful settlement conference in the future. Thus, there are times when I opt not to deploy the "price of admission" strategy. However, I have found that it is a useful tool in the right case, where its benefits outweigh its drawbacks. I also find that, in the vast majority of cases where I do employ the strategy, the price of admission is accepted by both parties, and a settlement conference proceeds that results in a resolution of the litigation. Finally, I have also observed that, despite the assumption among counsel that a settlement will likely be at the midpoint of the new range, I have successfully settled cases materially higher and lower than the midpoint of the range.

Conclusion

Effective mediators have multiple tools in their toolbox and know when to correctly employ the right one to facilitate settlement. As a judge-mediator in a particularly difficult settlement conference, I often run down my mental list of different tools in my possession to break impasse or further promote movement by the parties. I recognize that many of the techniques I identified above are used by mediators standing alone or in some combination at a settlement conference. But using the combination of these techniques before the settlement conference may be a helpful tool to add to a mediator's repertoire. In the right circumstances, deploying a price of admission strategy can promote early and significant movement from the parties and lead to a more productive and efficient settlement conference. ☉