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?

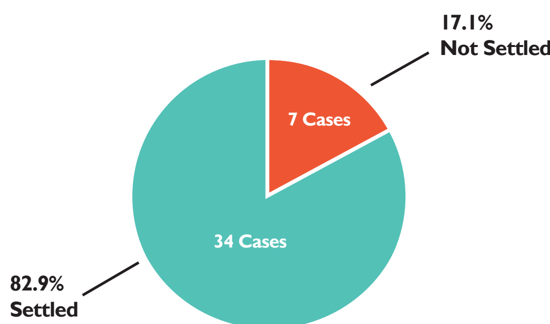
To try and answer these questions, I began tracking the initial offers, demands and settlement numbers on the cases that I mediated. My goal was to do an empirical analysis to determine the relationship between them and to use this information in assisting the Parties to overcome "anchoring" and positional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

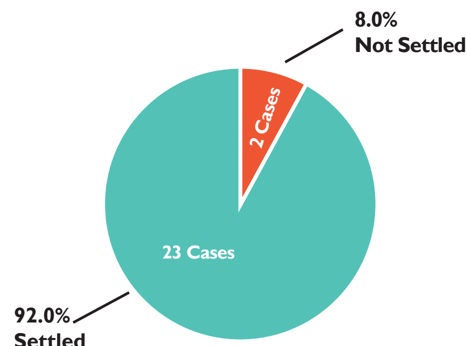
This article will examine: 1) the correlation between the demand and settlement amount; 2) the correlation between the offer and settlement amount; 3) whether the settlement percentage at mediation is higher for cases that were filed in court versus cases that were mediated pre-suit; and 4) the percentage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

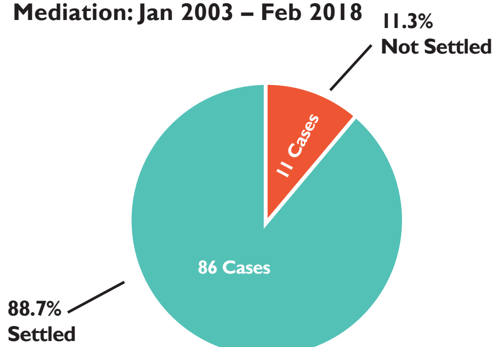
A. METHODOLOGY

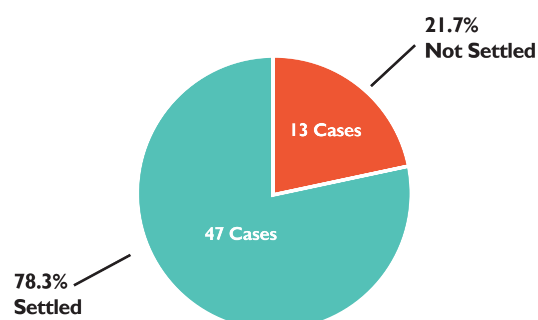
I reviewed the demand, offer and ultimate settlement amount for 223 civil cases I mediated from 2013 to 2017. Some of the cases were mediated pre-suit, but the majority of the cases had been filed in court. The cases were put into one of four categories: employment, tort (e.g. medical malpractice, product 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	# of cases	% of cases	# of cases	% of cases			
	cases	settled	Settled	not settled	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.

Certified Auto/Motorcycle Appraisals

Certified Appraisers for:
Insurance Value
Expert Witness
Charitable Donations
Total Loss
Diminished Value

Auto Appraisal Group • John Golias
440-526-3445 • 800-848-2886
www.autoappraisal.com

[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.

Special thanks to Tina Rhodes of Giffen & Kaminski for her assistance and insight in writing this article.

Peggy is a Partner at the firm of Giffen & Kaminski where she practices in the areas of arbitration, mediation, and private judging. She is a popular speaker and author on trends and topics in ADR, a member of a several national ADR panels, and is also active in the CMBA Dispute Resolution Section and the ABA's Dispute Resolution Section. Ms. Jones has been a CMBA member since 1991. She can be reached at pfjones@ thinkgk.com.

Dennis has over 25 years of experience assisting senior executives, board of directors and legal counsel with complex financial issues requiring forensic accounting expertise. Dennis has extensive experience in financial analysis of complex commercial disputes involving intellectual property, business interruption, professional negligence, business valuation, acquisition and divestiture, employment and various other breach of contract matters. He has been a CMBA member since 2007. He can be reached at (216) 357-2646 or dmedica@medicacpa.com.