Notes from the Frontline

"Waiting for No" and Other Ineffective Bargaining Strategies
by: Glenn M. Gottlieb, Esq., Attorney-Mediator

One of the most valuable roles an effective mediator can play is that of "educator." Parties caught up in a dispute – hardened in their adversarial positions – naturally tend to retreat to "safe" ideas and "tried and true" strategies. Unfortunately, to paraphrase Will Rogers, "It isn't what we ***don't*** know that gives us trouble; it's what we **know for sure** that just ain't so!"

I often make an effort to educate parties involved in a distributive negotiation (the so-called, "zero sum game") that, contrary to popular myth, negotiated deals don't resolve at the mid-point of **any** set of the parties' successive offers. They tend to resolve toward the mid-point of the parties' first two **reasonable offers**.

For this purpose, "reasonableness" must be viewed from the eyes of the opponent. As I am fond of reminding parties, "You have to hang the meat where the bear can smell it!"

Recently I conducted a mediation with a seriously injured plaintiff whose opponent's liability would not be easy to establish. Plaintiff's first offer – in the mid-$200,000 range – was met by the defendant's "nuisance" offer of $10,000. Plaintiff's counsel readily admitted that her offer was too high, even if the defendant gave full value to her client's claimed injuries. She confided in me that she simply didn't want to be the first one to move toward a realistic number. On the other side, I already knew that the defense was willing to go as high as $85,000.

After a couple of rounds of bargaining, the plaintiff had come down only marginally to the low-$200,000 range, while defendant had edged up to only $20,000– with neither breaking into the "reasonable" range of the other party. To attempt to move things forward before impasse was reached, I walked both sides (in our separate caucuses) through a "decision-tree" analysis, assigning values and probabilities to the various outcomes.

On the plaintiff's side, we agreed that plaintiff's injuries might be more or less in the low to mid-$100,000 range. Discounting for the less-than-slam-dunk liability case, we settled on a reasonable value in the high-five to low-six figures.

Over the next few rounds of bargaining, I persistently, but diplomatically, urged plaintiff's counsel to "anchor" the bargaining range by making the first reasonable demand. Nevertheless, plaintiff stubbornly continued to answer defendant's "unreasonably" low offers with her own unreasonably high demands. Defendant, similarly, refused to put meaningful dollars on the table until plaintiff became "more realistic" about the value of the case, reasoning that he didn't have as far to move before he started "running out of room" with his authority.

It didn't take too long for me to realize that what plaintiff's counsel was really waiting for was the defense to "just say no." As long as defendant was increasing his offers, no matter how small the increment, she would stay at the table. She appeared to believe that the defendant would ultimately go to the limit of his authority, regardless of her own bargaining moves, and appeared prepared to simply wait until the defense ran out of authority and put its last dollar on the table.

Though I rarely encourage the giving of an ultimatum, I told the defense that plaintiff might simply be waiting for their "final" offer. Despite the considerable jump it would take to test my theory, defendant was willing to gamble on my intuition and make a "take it or leave it" offer of $45,000. Sure enough, plaintiff's counsel quickly caved, and accepted what she believed to be the defense's "bottom line."

By failing to move into the reasonable range, too many negotiators leave a substantial amount of money on the table – in this case, nearly half of what was admittedly available, and perhaps even more than that. I have run into this "Wait for No" strategy quite a number of times. In virtually every instance, I felt a more effective strategy – bargaining in the zone of reason – would have yielded a considerably better result, as it would have tested the other side's true limits.

These individuals share a common misapprehension: that hard bargaining means starting the negotiation at an excessively high or low number and staying there until the other side is forced to enter the range of reason. This kind of bargaining, however, can be counterproductive, as it cedes the advantage to the other party to set the bargaining range at its end of the scale. If, for example, plaintiff in my example had made an offer of $100,000, still above defendant's claimed limit of authority but within the policy limit, defendant would have been virtually constrained to put considerably more on the table.

Once again, practical experience confirms the fallacy of the "never make the first offer" folklore that remains so entrenched in some legal circles. The reality is that the "winner" – the one who will walk away with the greatest share of the bargaining surplus – will be the one who creates a "realistic" bargaining range toward his or her end of the scale.

It may sound self-serving, but I strongly recommend **listening** to your mediator, and letting him or her do their job! In doing so, remember to check your pre-conceptions at negotiation's door. Otherwise, you take the chance that what will get you in trouble is "what you know for sure that just ain't so!"

Glenn M. Gottlieb is an Attorney-Mediator practicing in Los Angeles, CA. More information is available on his website: www.glenngottlieb.com. He can be reached at: glenn@glenngottlieb.com.