



How did they price the file?

This story is for you if . . .

- You have had several mediations where there are huge gaps in your evaluation of the case versus your adversary's evaluation of the case;
- You have not spent any time getting a sense of how your adversary evaluates the case.



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The myth:

Defendants walk into the mediation room with an open mind and willingness to turn on a dime as they hear the story of your case.

Why it's misleading:

In anticipation of every negotiation, defendants look at checklists and reports to determine what price or range they are willing to put on a file. Once this occurs, they are generally not in a position to move off that price unless lightning strikes.

What to do:

Consider your role in the story of the negotiation. In essence, your client is selling a product that the other side would like to buy provided the price and terms are acceptable. In most industries where products and services are sold, the parties engage in a "prequalification" dance in which information is exchanged, motives are evaluated and objectives are considered. The most obvious area where this occurs is in retail finance. The loan officer gathers information from the borrower, makes a tentative decision based on that information and alerts the borrower as to whether they are credit worthy. If the borrower is found credit worthy, the lender determines the estimated amount that the person can afford to borrow. Time is not wasted negotiating deals with a borrower that is not credit worthy.

What is oftentimes missing in a legal negotiation is the lack of prequalification from both sides of the transaction. For example, the primary move a defendant will make in prequalifying a plaintiff is to ask for a demand. Naturally, a plaintiff does not want to leave any money on the table so the demand will far exceed the reasonable value of the case, sometimes in a range that is embarrassingly insulting. Thus, the defendant has gathered no additional information that allows them to determine if the plaintiff is motivated for the negotiation, what their objectives are or how they see

the value of the case. It is no wonder that so many mediated negotiations result in failure when the defense has not gathered enough information prior to the mediation about the plaintiff's goals.

Conversely, the plaintiff's side rarely seeks insight from the defense counsel or their principal as to what criteria they will be using to price the file. For example, will they be relying on objective standards from other cases, or simply using a formula based on a multiplier of special damages? Are there unusual factors about this case that militate in favor of higher value than normal? This is critical information that plaintiffs might consider before entering the mediation room.

The prequalification work that goes into understanding how a file is priced will make all the difference in the world in determining success at mediation. Here are five simple tools that can be done to prequalify a case in order to maximize success at mediation:

- Determine in advance who will be attending the mediation. While it is impossible to get final decision makers at every mediation, knowing you have people investing in travel to attend the mediation will certainly increase the chance of success;
- Ask your adversary before the negotiation what he or she feels is the fair market value for this type of case in general. You might be surprised at catching them off guard so that they give you information that's taken directly from their report to their principal;
- Ask your adversary if it would be helpful for you to give a large demand so that the case can be sent to the upper levels of the of the corporate defendant that is making decisions on the case;

Consider exchanging briefs with the other side that actually include a risk analysis. Save the confidential information for the mediator;

- Ask the mediator to contact each side before the mediation in order to diagnose expectations and objectives.

Knowing how the other side has priced the file will give you a leg up in the negotiation and will help you understand the background behind the negotiation moves that occur.

Jeffrey Krivis has mediated complex disputes in Northern and Southern California for 20 years. He teaches at Pepperdine Law School/Straus Institute for Dispute Resolution and has been named one of the Top Neutrals in the state by the Daily Journal.