Guitar logic in mediation: Cowboy chords vs. jazz

Learning from the guitar how to value your case

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Consider the guitar fretboard for a moment. It is a complex maze of horizontal, vertical and perpendicular dimensions to achieve sounds that stretch across a plank of wood up to 25 inches long. Its beauty lies in the ability of the player to form similar sounds anywhere on the board. It is intricate and elegant at the same time. Most average guitarists (myself included) tend to play simple cowboy chords learned around the campfire or listening to '60s folk music. We don't have the patience or time needed to study and comprehend the complexities of the instrument. Others prefer jazz where guitarists like Joe Pass or Wes Montgomery can play a similar sound up and down the neck of the guitar with slight changes in pitch that creates unexpected ear candy.

When it comes to evaluating a litigated case, most parties to a lawsuit play cowboy chords. They are fairly predictable, easy to understand and repetitive. This is because cowboy chords can be clearly demonstrated and categorized so that just about anyone can learn and play them.

Now consider how institutional parties in litigation have defined market values of cases in strict categories depending on a host of factors that have been vetted by actuarial specialists with complex software programs. This provides a reasonable sense of predictability when evaluating damages and allows for appropriate pricing of insurance products. The process is similar to the approach used by polling specialist Nate Silver on his *Five Thirty Eight Blog* in the New York Times to predict the 2012 Obama landslide presidential victory when all other polling favored a different outcome. Convincingly, Silver used this approach to consistently predict with accuracy the last several presidential races based on accumulating data from all the polls and coming up with median numbers.

The models used by Silver are nothing new to economics and are similar to risk management as it applies to evaluating potential outcomes in litigated cases. The key is to include all biased elements of polling data and find a common median. This is somewhat counter-intuitive in that being overly inclusive actually provides a more accurate prediction of the outcome. To understand this, Silver considers information from all polling sources, no matter how biased, when integrating the data into his values. Based on the accumulation of this data, Silver predicts outcomes that are surprisingly accurate.

Cowboy chords

The same approach holds true in litigated cases. Insurers and many corporations have unvarnished data that provide them with settlement values based on historical criteria that is based on certain categories of disputes, including the dispute you have brought to mediation. They know their marketplace and accept information from all sources. This allows them to quickly categorize a case and use simple economics to determine relative value. This categorization, in essence, removes the human element from the evaluation, using only objective criteria to reach a fair market value. While it might sound cold and calculated, it is notably successful for companies on a macro level to handle repetitive streams of disputes this way. In fact, it's a huge profit center that would not work if each case were subjectively evaluated. The transaction costs alone would be staggering. The ability to categorize cases has allowed negotiators to play cowboy chords and sound like they are making music.

Consumer attorneys also play cowboy chords, at least most of the time. That is why many cases settle for consistent market values. However, when a consumer attorney decides to value their case higher than the market permits, that attorney is playing jazz while their adversary is still playing cowboy chords. The decision to play the guitar up and down the neck like Joe Pass to try to create more value on a case is based partly on the ability to go to trial and partly on subjective experience. Often this subjective experience is based on gut value as opposed to strict polling data. Other times it's based on supreme confidence in your case. You know you have an aggrieved client, and the client deserves much more than the company is willing to offer. You conclude that the other side just doesn't get it, and you're prepared to take the case to the limit if the other side doesn't get on your value train. This mindset is hugely successful when the shadows of the courthouse hang over the heads of the parties because the music of risk is playing to the ears of the decision makers. Indeed in a small portion of the cases in the civil justice system, this approach creates tremendous financial opportunities for clients. The primary impediment to this approach is that only a tiny percentage of cases ever get through the justice system to the

courthouse steps. This reality of the system puts pressure on the parties to navigate a settlement into the category that tends to follow statistical formulas.

Learn how your adversary has categorized the case

Against this backdrop, parties have two basic options when trying to get more value on a case.

Learn from the mediator whether the marketplace value is within striking distance of your own criteria for settlement. If your value isn't in the range of the usual and customary fair market value for the category of case you brought to the table, and the shadow of the courthouse is far off in the sunset, your choices may be limited. Knowing how the other side has categorized the dispute will give you a clear pathway toward settlement, but not necessarily at a financial level your gut desires. At minimum, you will give your client a definitive option of waiting until the case is closer to trial or accepting a sum that fits within the range of similar disputes. Ignoring the category your adversary has used can result in falling over the fiscal cliff of resolution with no way to turn back.

Use the mediator to identify what additional information is needed

Another option to consider is to discover from the mediator what it would take for the other side to re-categorize the case i.e., increase the reserves to more closely match your value. This usually involves some additional information about risk, such as the filing of a class-certification motion in a wage-and-hour case, or a report from a respected neurosurgeon in a brain injury case. That type of information often allows parties to attempt to hear the music of the case as

more jazz oriented than cowboy chord driven.

A few examples

In a misclassification case involving managers at a retail store, the mediator asked the plaintiffs to simply explain how they spend their day from the moment they entered the store until they clocked out. For the next 20 minutes the plaintiffs told a narrative that demonstrated unequivocally that more than 50 percent of their time was spent on non-exempt functions such as stocking shelves, cleaning floors and selling goods. This extemporaneous explanation from credible parties was the first time the employer actually heard how the evidence might be presented in court, and it enlightened them more then the deposition summaries they received. This straight-forward and obvious moment led the employer to request an adjournment of the mediation, with the acknowledgment that they needed to discuss case values with management and adjust their financial reserves on the case. The employer then requested a second session of mediation where the case settled for a value higher than the reserve put on the case based on the garden variety category it was placed in. Note that a suggestion for a second session is code for "We hear you're playing different chords than us, and we are open to learning your tune."

A similar thing happened in a wrongful death action where it was discovered at the mediation that the decedent was making significantly more money than the defense had learned through discovery, which clearly increased the potential verdict value. Once again, the category of the case had to be reset, and the parties were able to have the mediator negotiate a mutually acceptable "recommendation" that could be taken back to higher levels for final approval.

Conclusion

To summarize, when you arrive at a settlement meeting, the other side desperately needs to put your case (and you!) into an existing category because the bureaucratic cost of inventing a new category for every new case is impossible for the system to handle. That is why so many big value cases don't settle until the eve of trial, when institutional decision makers have had an opportunity to redefine the category and increase or lower the value.

Naturally you can always refuse to be categorized, or to spend the time through mediation learning how the other side has categorized your case. You can insist that it's unfair that companies judge cases like this, that the categories available are too constricting and that what you are trying to sell is too unique to be categorized. If you make this choice, the odds are you will be categorized anyway. Participating in the process is an important way to gather intelligence about how and why your case has been valued, and it gives you a chance to make decisions on whether to make the case a long-term project or short-term gain. Getting upset when the other side is playing cowboy chords and you're playing jazz is not productive. You will likely be miscategorized, which is far worse than being categorized.

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