

Mediation/Negotiation Tip: Insulting First Offers

People enter a mediation looking for a favorable deal. Negotiation in the lawsuit culture often begins with extreme offers that would represent a total surrender if they were accepted—and of course, they never are. That’s par for the course, expected by each side.

But add to this the impact of genuinely substantial differences in how the two sides see the case and you have a prescription for getting bogged down and frustrated. Here are some thoughts for counteracting this problem:

- Before articulating an initial settlement position, hash out the basic factual and legal points with opposing counsel. It’s then less likely that a demand or first offer will be so extreme as to be “insulting,” or that a *reasonable* starting place will be perceived as an insult.
- The joint session of a mediation is an excellent chance for this dialogue, but open communication about the merits issues and drilling down into the evidence and case law should not start then. People entering a mediation with impressions and expectations have much more difficulty being flexible than those who have been prepared for the bad news. Your key points should be expressed repeatedly—people tend not to listen well to adverse information. Joint session only needs to emphasize key points that should make the other side more open to seeing your viewpoint and taking it into consideration.
- When you take an initial position, explain your view of the merits of the disputed claim and how that affects the demand or offer being made. Cite to specific facts or law. Let the other side know the factors affecting your position.
- Try to keep your client from reacting emotionally to an “insulting” first offer. Explain that the first offer is simply a data point to start understanding the other side. It is no basis on which to judge where the negotiation will ultimately end up.
- If you are confronted with an extreme first position, be patient. As the bargaining continues, try to figure out whether the problem is that the other side does not understand the issues well enough to take a more reasonable position; or if they are waiting for a signal of flexibility on your end before showing any flexibility; or if the approach is testing your side’s willingness to make concessions; or whether you are simply dealing with an overly aggressive bargainer.
- Analyze the movement and messages accompanying them for information on what your counterpart has in mind—which can change as the process unfolds. Extreme positions almost never moderate all at once—typically a series of baby steps is needed to get into a reasonable range. Focus on how you can best move that process along—in one circumstance this may require a concessionary move, and in another an aggressive response.

Steps like these can reduce the risk that someone takes an extreme position or, if it is inevitable, can speed the process of bringing people to a common number on which they can agree.