

Mediation: Mega Cases and Avoidance Actions

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Why Mediation?

- Speed
- Cost/Fees
- Educate client that won't listen
- Hope the mediator will convince the other side they are wrong and will lose

Mega Cases/Multiple Avoidance Actions

- Entry of Procedures Orders
 - Mandatory or court ordered
- Can You challenge the Order?
 - Due Process; order already entered
 - Notice of potential claim
 - Impairment of Rights

Selection of a Mediator

- Training
 - St. John's Bankruptcy Mediation Training
- Background in bankruptcy
- Panel of mediators to pick from
- Former Judge vs. current Judge vs. retired attorney vs. practicing attorney
- Style/personality of mediator

Do What Great Negotiators Do

Set aside time to prepare

- Allow time for information exchange
- Work with mediator to set a realistic date
- Noodle with your negotiating team before mediation
 - risk and interests to be considered
- Explain the process to the client
- Are you licensed in that jurisdiction? Do you need to be?
- Understanding what client wants and preparing a plan
 - position v. interest bargaining

Do What Great Negotiators Do (cont.)

Use the mediator effectively

- To convey a need for information
- To help you manage your client's expectations
- To help you formulate clear communications with your proposals
- To interpret your proposals to the other side
- To help you develop a plan for your negotiations
- To help you or your client with strong emotions
- To get out of the way so that you and your client can talk

Do What Great Negotiators Do (cont.)

Develop a negotiator's mindset

- Study the subject of negotiation
- Plan the settlement process as well as you do the trial process
 - Remember the team
- Speak in plain English; lose the legalese
- Excise adjectives and adverbs from your language
- Treat the opposing party with respect
 - Tone
 - Volume
- Eye contact---don't put the client on the spot

Planning For Mediation

- In order to assess your risk, you may need to ask for information
- Mediator may ask parties to exchange information
 - Do not expect people to absorb new information, expert opinions and legal theories, and make decisions based upon them, if they are hearing them for the first time at mediation.
- Exchange Information (prior to Mandatory Settlement Conf.)
 - Plaintiffs: (Debtor/Trustee/Creditors/Committee/Administrator)
 - Debtor's Books and Records
 - Check Register
 - Cancelled Checks
 - Bank Statements
 - Defendants: (Vendor/Supplier/Lessor)
 - Invoices
 - Agreements
 - Contracts
 - Ordinary course analysis – standard deviation
 - New value analysis – supporting invoices
 - Industry Standard (if applicable)

Planning For Mediation (cont.)

Risk Analysis Questions

- What does each side get if they win or lose?
- What are the probabilities of winning?
- Cost of litigation
 - Lost business opportunity
 - Non-monetary costs (e.g. reputation)
 - Direct, out-of-pocket costs

Mediation Conference

- Opening statement
 - Settlement focused
- Create a dialogue
- Talk about mediation process
 - Confidentiality, cooperating and courtesy
- Caucuses and joint sessions

Two Basic Forms of Negotiation

Position-Based Bargaining

- Difficult to get started, to keep going, and to close the gap at the end
- Characterized by a process of making concessions

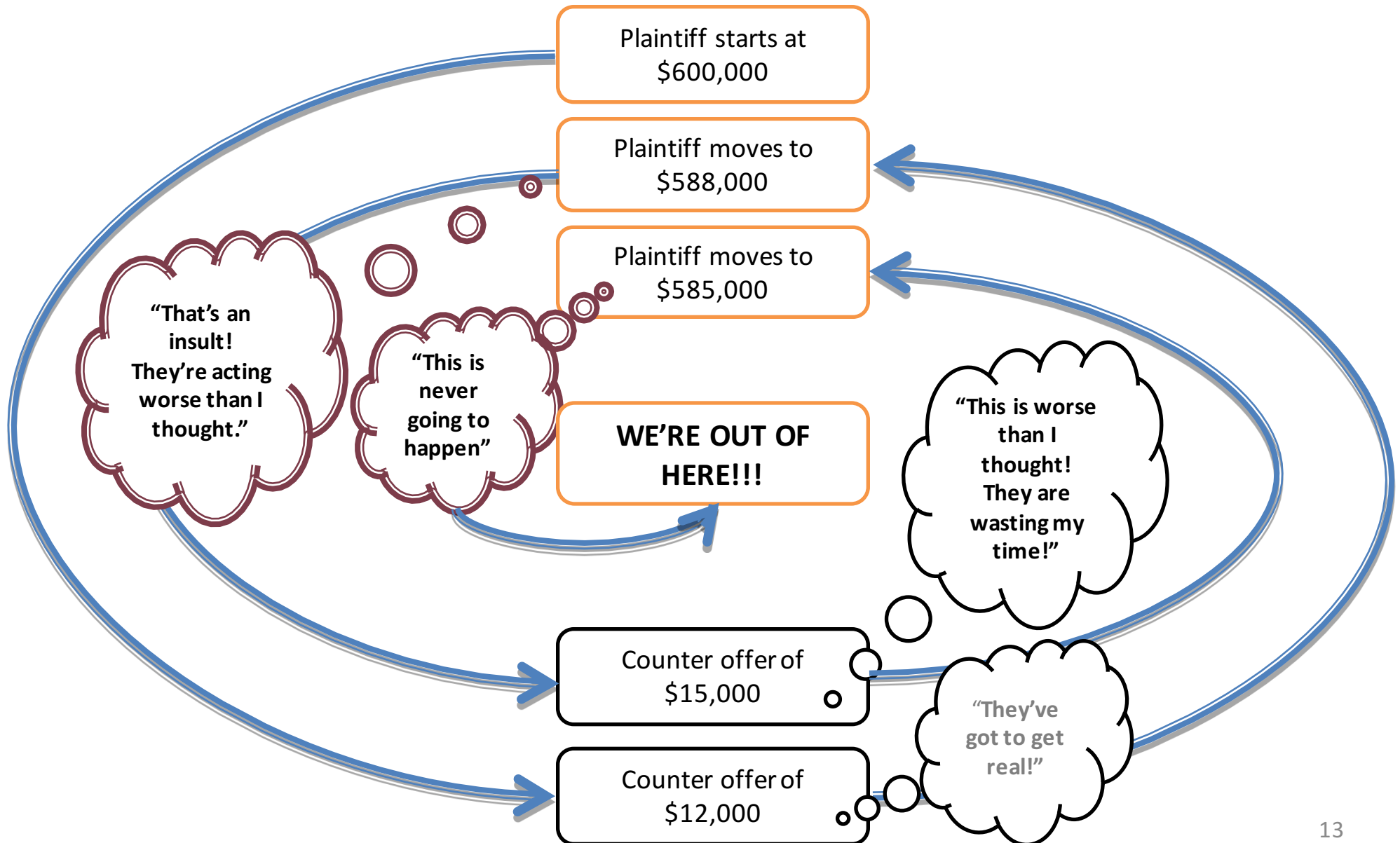
Interest-based negotiating

- Reframed negotiation from bargaining to problem-solving
- Based on clear definition of each side's needs, interests, goals and objectives
- Creative win/win solutions
- Parties go away satisfied

The Settlement of Civil Litigation is Dominated by Positional Bargaining

- The conversation is about case evaluation: what the case “is worth”
- The parties want private time to discuss strengths and weaknesses
- There are multiple rounds of proposals and counter proposals
- The parties agonize over whether to counter and, if so, how to formulate their proposals

The Death Spiral of Position-based Bargaining



An Analysis of Reactive Bargaining Using Communication Theory

Plaintiff's first number

- He who goes first stakes himself out
- So the plaintiff fudges on the high side
- The team often is not of one accord
- Plaintiff is frequently not experienced in case analysis

Defendant's first reaction

- “He doesn't know how to value his case”
- “He's wasting my time”
- “I need to send him a message”
 - “Get real”
 - “Get out of the stratosphere”

Three Important Insights

1. We tend to formulate proposals in reaction to the other party's proposal
 - Out of a sense of irritation or frustration
2. We intend our proposals to be messages to the other side
 - Usually, “You’re in the wrong ballpark; get in the proper ballpark”
3. The message we send is not received as we intended it

The Bargaining Death Spiral Revisited

- One party's proposal is out of line with the expectation of the other side
- This leads to a reaction of the other party doing a much lower counter-offer
- If the parties are too reactive, they each pull back in their counter-offers as a way to send a message
- The negotiation stalls or ends because each side believes the top and bottom numbers will never lead to settlement
- Irony: Each side's best number is closer than they thought, but they'll never know because they quit in frustration

Opportunities for Impasse are Numerous

- Making Money Talk
 - They're not here in good faith
 - We want them to know we're serious
- We're not going to pay a dime more than the other companies
- We don't have any more room to move
- They're not moving fast enough
- We'll never get there at this rate
- They only moved 5, so I'll only move 5
- They've got to move a lot more than we do

How Do You Avoid the Bargaining Death Spiral?

- Learn to recognize when you're being reactive
- Construct proposals that are well-formed communications about your range of settlement

A well-formed proposal communicates the following:

- I'm here to settle the case
- I'm still moving and in the game

How Do You Avoid the Bargaining Death Spiral?

- Reactive Responses – Don't communicate these things
 - Packing up
 - Demanding they bid against themselves
 - Low balling/Slowing down
 - Give me a realistic number and I'll get in the game
 - No counter proposal
- Instead, they communicate that they will settle in a lower/higher range than is actually true

Four Important Things to Remember About Movement, Messages and Communication

1. Movement breeds movement
 - Lack of movement does the opposite
2. A complete message about the proper range of settlement may occur over a series of moves
3. A decrease in the increment of movement signals that one is 'slowing down' or 'getting to the end'
4. One sometimes has to add words to a monetary proposal to complete the communication

The Interest-Based Model of the Negotiation Process

Turning arguing and bargaining into creative problem-solving for mutual gain

- Positional Bargaining: “Everybody goes away a little unhappy”
- Interest-Based Negotiations: “We all get what we need”

The Interest-Based Model of the Negotiation Process

Stages of the Negotiation Process

1. Learn more about the goals of both sides
 - Use open-ended questions to learn what each of you need
2. Clearly define the problem to be solved and the goals to be achieved
 - Become adept at summarizing what you've heard in terms of the clients' concerns, goals, needs and objectives

Settlement

- Documentation
- Section 502(h)
- Preserving claims against third parties
- Releases – “all claims, known and unknown”