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PERSPECTIVE

## The advantages of moving first in a mediation

By Hon. Jay C. Gandhi

Often no one wants to make the first move at a mediation. It is a recurrent theme in many mediations and across the legal spectrum — business cases, intellectual property infringement suits, single plaintiff or class actions:

“You go first.”

“No, you go first.”

Why wait? Most people instinctively believe that they gain insight into the other side’s bargaining position. It is a sneak preview, so to speak. But psychological research belies this conventional wisdom. Clinical studies demonstrate that a first-mover gains the following advantages in a negotiation: “anchoring,” control and flexibility.

One of the more notable advantages is the “anchoring” effect of a first offer. The first number that enters the negotiation environment dramatically influences our value judgments. People have a tendency to use the value of the first offer to estimate the true value of an item or service up for negotiation and to adjust insufficiently from this anchor. And, a first offer maintains its strong gravitational pull throughout the negotiation process. As Adam Galinsky, a professor of management at Columbia Business School, pointed out in his study, “[e]ven when people know that a particular anchor should not influence their judgments, they are often incapable of resisting its influence” and “[a]s a result, they insufficiently adjust their valuations away from the anchor.”

Now, most lawyers think that they would not fall victim to such mental inducement. “These are not the droids that you are looking for,” to steal from Obi-Wan Kenobi. Yet, research shows that sophisticated parties are not immune from this human behavioral phenomenon. Let’s turn to the research of Greg

Northcraft and Margaret Neale. They researched the effects of perception and anchor points in the context of real estate negotiations.

Real estate agents, whom were experienced in pricing properties, were given identical information about properties and amenities. Yet, opening offers were selected at random from a group of four offers: \$119,000, \$129,000, \$139,000 and \$149,000. Agents studied the listing information and evaluated the properties after touring the homes for 20 minutes. Invariably, the real estate agents denied being influenced by the initial price, but those agents who received a greater initial offer gave the homes higher appraisals.

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In short, once an anchor is dropped, subsequent judgments are made by adjusting around that anchor, and there is a natural bias toward interpreting other information through the lens of that original bid or ask. Anecdotally, how many times in a mediation have you referenced where the plaintiff or defendant started? In this way, a deliberate starting point can affect the range of possible counteroffers and, thus, define the bargaining zone and the range of possible agreements.

First-mover advantages do not end there. Another advantage is to set the tone and control the discussion. Numbers send messages. One of the more important messages to communicate in the negotiation process is confidence. Those who lack confidence, due to an inse-

curity in their own pricing of the case, or unfamiliarity with the facts or the law, or some other reason, are typically disinclined to make a first offer. In so doing, they invite doubt into their positions. Calculating opponents often sense these vulnerabilities and attempt to take advantage of them. Unsurprisingly, the studies indicate that control and credibility ordinarily lead to better results in a negotiation.

A further advantage of moving first is flexibility. Settlement negotiations are dynamic, fluid processes. The first offer and the first counteroffer rarely resolve the matter. It’s chess, not checkers. A reasonably aggressive offer from the start may provide leeway down the road for making concessions. And in settlement negotiations, sometimes one argument is the number and size of the concessions you “let” an opponent extract from you; a sizeable move by one side may typically cause the other side to reciprocate, at least in some measure.

Granted, for every rule, there’s an exception, or two or three, and here come a few of them. Not all first offers are created equal. Think Dr. Evil demanding one million dollars, and don’t forget the pinky. The worst first offers are those that are far outside the reasonable bargaining zone. They are commonly ignored by the recipient or mirrored “tit for tat” in a counteroffer. Neither is productive. First offers should be carefully calibrated, and designed to draw out a solid counteroffer. Negotiators who aim too high on their optimal price risk regret. Without ever realizing it, they reject even the possibility of a profitable agreement. They do not even discover what could have been. Simple and well known, but too oft forgotten, it is more prudent to focus on a sound and sensible target price and make an aggressive offer, but be willing to compromise

and still obtain a gainful deal, or at least learn that some type of deal is available, whether you ultimately accept or not.

Making the first move could be imprudent for other reasons. For instance, the psychological profile of your client may call that you wait for the first offer. Some people develop anxieties if mediations resolve too quickly, even if they get most of what they desired. These people might feel that they have been deceived in some way. In emotionally charged cases, which can include certain commercial litigation, some clients just need a long dance of blustering and bluffing for cathartic purposes. In these instances, the priority lies in keeping the settlement dialogue alive, as opposed to the exchange of specific dollar values.

In the end, and without further movie references, it is axiomatic that each negotiation should be tailored to the particular facts and parties of a case. Trite but true, never say never, and always avoid always. But the tactical benefits of making the first offer are plain indeed. You define the field. You control the process. You exhibit confidence. You proactively take charge of the negotiation. So, at your next mediation, you may want to rethink about shying away from making the first move. Perhaps, you should welcome that opportunity, and strive to capitalize on first-mover advantages.

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