



Closing the Gap

Arthur H. Glaser

Henning Mediation & Arbitration Service, Inc.

3350 Riverwood Parkway, SE

Lobby Level – Suite 75

Atlanta, Georgia 30339

art@henningmediation.com

“As doctors seldom take their own prescriptions and divines do not always practice what they preach, so lawyers are very shy of meddling with the law on their own account, knowing it to be an edged tool of uncertain application, very expensive in the working, and rather remarkable for its properties of close shaving, than for its always shaving, than for its always shaving the right person.”

-Dickens, *The Old Curiosity Shop*

Closing the Gap

1. Reduce Plaintiff's unreasonable expectations

Educate

- Plaintiff is usually the only non-professional
- How do insurance companies think- use their own counsel to help define parameters – before meeting with defendants
- Measuring litigation risk and valuing that risk based on experience
- At mediation parties value, at court strangers value
- Statistical advantage of insurers and large corporations:
 1. Always get average
 2. Time value of money
- Review factors raised by defense or anticipated by mediation – “Echo Effect” – counsel has already discussed or needs mediator’s help (sensitive issues: felony convictions, drugs, alcohol, etc.)
- Acknowledge limitations of process

2. Determine Plaintiff's other needs

- Apology
- Acknowledgement of loss
- Vent
- What money can do since we can't do what we really want (return of health or loved one)
- Specific goals (pay off mortgage, educate children, replace income stream, provide for retirement)

3. Use of Structures

- Listen for needs
- Replace income stream
- Educate children
- Introduce early – educate – tax consequences
- Don't use "Buy case cheaper" but to illustrate _____ of it being offered
- Full illustrations – cost, rate of return, etc.
- Rated age

4. Attorney's Fees

- Counsel on contingency has some risk as plaintiff
- Final negotiation is often between plaintiff and plaintiff's counsel
- Power of Fee Cut on defendants

5. Working Backwards from Plaintiff's Target

- Net, net, net – what plaintiff should be interested in
- Can't be less than attorney share
- Effect of high cost on net – defendants often unaware of realities of plaintiff's practice

What Do We Do At Mediation

- Recognize litigation risk which is created before mediation – witnesses, experts, motions, judge, jurisdiction, parties' conduct and appearance.
- Can't surprise insurance company or corporate defendant (too many decision makers/lose ally in defendant's counsel).
- Can surprise plaintiff's counsel (especially if plaintiff hasn't told counsel the truth).
- Communicate risk – chance to talk directly – delivering the bad news – negotiating style(s).

How Do We Do This

- Determine the Gap
 - In Confidence
 - a) Counsel's perception of other side and own risk
 - b) Compare
 - In Negotiations
 - a) Why do we start at 1-10 when real business occurs between 4-6?
 - b) Weakness of "Slice of Bread"
 - c) Possibilities in Bracketing
 - d) It's all about effective communications
 - e) Supplying rationale for positions
 - Increase Confidence
 - a) In process
 - b) Mediator
 - c) In bargaining partner

Why Use Brackets

1. Provides information to other party without having to change posture from which later negotiations will begin if mediation fails; i.e., information without risking poor positioning for future negotiations or position to be held until confident that real negotiation is possible.
2. You usually obtain the reciprocal of the information you give.

3. Provides encouragement to other side while still making your point, i.e., plaintiff can signal coming down into real negotiating range, while waiting to confirm defendant is also and visa versa.
4. Needed because “Slice of Bread” method is hard to extrapolate from unless many moves are made and this tends to be overly frustrating to uninitiated.
5. Allows mediator to begin suggesting where real negotiating will occur and to assign rational reasons to the relative bargaining positions.

Use of Brackets

1. Narrow brackets send better information than wide brackets (don't confuse by over-accommodation).
2. Mid points of brackets are of similar importance to the end of the bracket closest to opponent's bracket (plaintiff's low/defendant's high).
3. When not intersected, the brackets can indicate willingness to compromise by moving ends closest towards one another (watch rate at which closure occurs – will one party accept disproportionate moves?)
4. When non-intersecting end of brackets stops movement toward opposing bracket, then that immovable number is very important to that party.