1-1-1987

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Recommended Citation

Making the Opening Settlement Offer, 14 Litigation 3 (1987)

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Making the Opening Settlement Offer

Sometimes a judge can help resolve a case by holding a settlement conference. When this happens, you need to do more than show up on time. You must prepare thoroughly and ask yourself the critical question: What should my opening offer or demand be?

Your opening offer is a statement about your client’s current settlement position. The judge who hosts your conference will be looking for clues about your client’s real position, and there are many important messages you can send to the judge through your opening figure. You and your client should take this into account in setting a figure to offer or to demand, and in deciding how you will present the opening figure.

There are almost as many schools of thought about picking the opening figure as there are lawyers. No scientific study is available to prove one school right and another one wrong; instead, we are left to our experience and instincts.

Still, there are a few hard and fast rules about settlement.

• First, do not open with a number that is extreme. Opening with a figure outside the range of plausibility insults both the judge and your opponent. It also suggests that your approach to the process will be dominated by gaming rather than by reasoning. Extreme figures damage your credibility with the judge at a time when you want him or her as an ally, and they discourage the judge and your opponent from putting serious energy into the negotiations.

There is another danger. Putting an extreme number on the table may encourage your client’s false hopes. Those hopes could become serious obstacles to reaching an agreement later, and they create the possibility that your client will be disappointed in the settlement.

• The second rule is this: Do not open with the client’s real bottom line. The judge and the opposition will expect you to show some flexibility, so your opening offer should allow room to adjust if you learn things during the conference that affect your client’s position.

You also want to leave room for an important part of negotiating: allowing your opponents to feel as though they have accomplished something. You want to have something to give so that you can break logjams, generate momentum, demonstrate good faith, or reciprocate for movement or concessions that the opposition has made.

Remember a general point about human nature: Everyone likes to feel that his or her work makes a difference. In settlement negotiations, the lawyers on both sides want to feel good about their lawyering, and the client wants to see something for the fee. If you deprive people of those kinds of feelings, you create obstacles to reaching a settlement.

• Rule three: Do not try to sell what your opponent has already rejected.

Not long ago, I hosted a conference in which the plaintiff’s lawyer spent an hour trying to persuade me to make a pitch for a specific figure. When I explained the plaintiff’s proposal to the defense team, I learned that the same terms had been discussed at length in an earlier settlement negotiation and had been vigorously rejected.

I concluded that the plaintiff’s lawyers had been trying to use me to leverage a deal they had been unable to sell on their own. They had not told me that the offer had been rejected and they had given me no new ammunition to use in persuading the defense to accept their offer. By not warning me about the history of negotiations, the plaintiff’s lawyers lost credibility with me, not just for that case, but for others as well.

Perhaps you have a special circumstance to justify opening with a figure that already has been rejected. In that case, you must explain to the judge what you are doing and why. The judge will have no credibility with the other side unless it is possible to say:

I know that the terms I am about to discuss have already been the subject of extensive negotiations. I know you rejected them. But the plaintiff has developed some additional support for the figure, and I would like you to rethink your position. Here is why.

by Wayne D. Brazil

United States Magistrate
Northern District
of California

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This article was adapted from Effective Approaches to Settlement: A Handbook for Lawyers and Judges, which will be published by Prentice Hall Law & Business this spring.
• In determining your opening number, ask, “What numbers do the law and the evidence justify?”

This is the single most important factor in deciding what the number should be. When the judge asks you to support your number, you must be able to do so based on the evidence, the law, or special limitations on the parties’ economic resources. After all, it is your job to show the judge how to explain your number to the opposition. Moreover, your credibility will be in shambles if your effort to rationalize your figure falls flat.

You must consider comparable cases. If figures are available for meaningfully comparable cases that have been settled or tried to judgment in your region or in a similar locale (for example, through jury verdict publications), use that information to help determine your client’s opening figure. Also, the documentation you provide of values from comparable cases will lend credibility to your number. Finally, it will ensure that you avoid opening with a figure that your opponent can show is significantly out of line.

• Next, consider how far the case has developed. Ask how completely the evidence is known; how clearly the relevant law has been established; and how well you understand the situations of the parties outside the litigation, especially their economic health. For example, knowing that your opponent has serious cash flow problems or is teetering on the edge of bankruptcy is essential to making an informed decision about settlement.

The more mature the case, the less room you need to leave between your opening figure and where you expect to settle. By contrast, if there is a real possibility you will learn something later that will affect your valuation of the case—whether from the judge or your opponent during the settlement conference or from discovery or informal investigation—leave more room between that first number and your client’s likely bottom line.

• You also should consider how certain you can be about damages. If key elements of damages are difficult to value (for example, pain and suffering, punitive damages, or loss of consortium), you can be more generous in picking an opening number. If a jury will assess these damages, you have more room for legitimate maneuvering. But if damages can be calculated precisely, a high opening bid will look way off the mark. For example, if the case is a simple wrongful termination claim with no prospect of punitive damages and no claim for emotional distress, and if your client has found another job with decent long-range prospects, calculating wage and benefit losses should be relatively straightforward. In that setting, the range of plausible opening offers or demands will be much narrower than in a serious personal injury matter or a complex commercial case.

• You also need to consider the human elements. You can get a measure of your opponent and the client from your dealings in this case and from talking with other lawyers who know them. If the opposition has a reputation for being straightforward or for being impatient with the ritualistic process of exchanging a series of offers and demands, you might serve your client better by opening with an offer relatively close to the real bottom line. By contrast, if your adversary approaches negotiations as if they were a global war of attrition, you had better leave lots of room.

Acting Like a Tiger

• Also, think about whether your opponents have a special need to feel that they are the winners in the settlement negotiations. Some litigators relentlessly assess every event in terms of how well they outperform others. If this describes your adversaries, structure your opening position so that your opponents will feel that they have compromised more than they have.

Sometimes the opposing lawyer is under great pressure from the client to perform like a tiger. A lawyer who feels that kind of pressure needs to be able to tell the client that dramatic concessions were made, by virtue of his or her toughness or subtlety. If you can help with this victory, your chance for a favorable settlement will be better.

You also should think about what your opponent’s opening figure is likely to be. All other things being equal (I am not sure they ever are), you should open with a number that permits parity of movement by both sides. Lawyers and clients are not likely to feel that the negotiations were fair if one party did virtually all the giving.

At the same time, it will hurt your credibility if your negotiating positions seem entirely reactive. Your opening figure should not be based on your opponent’s position alone.

• Assess your own strengths and weaknesses as a negotiator. And think about your reputation in the legal community—what it is and what you want it to be. If you are intellectually facile and strong-willed, you need not worry much about leaving room for regrouping. If you are less confident in your ability to hold ground, however, leave room to retreat.

If your negotiating style is well known— at least to your opponent, you probably should not deviate much from that pattern. If you are just starting to build a reputation, say, for being a particularly straightforward negotiator, open with a figure that is close to the mark.

• In preparing for the settlement conference, be sure to consider the judge’s expectations and expertise. If the judge is impatient with gaming, you will want your opening position to be near your client’s true bottom line. On the other hand, if the judge is a former wheeler-dealer who is fully at home with the layers of disingenuousness that often overlay these proceedings, you can afford to leave more room for jockeying.

Think, too, about the judge’s level of expertise in the substantive area of your lawsuit. What information will the judge have about the action before the conference begins? The more familiar the judge is with the case, the more cautious you should be about opening with an unrealistic figure. A judge who suspects your intelligence or honesty at the beginning is less likely to accept statements you make later, no matter how sincere they are.

• Finally, think about where you are in negotiations. If this is the parties’ first attempt to settle, it may make sense to leave ample space between the opening figure and the bottom line. But if negotiations are underway and both sides already have moved considerably, less space is needed.

All other things being equal, the

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Winning Without Trial

You and your adversary over here—and way up there, the judge. That is how it looks when you argue a summary judgment motion or a motion to dismiss. No client, no jury, no witnesses. It may seem lonely; but when you win, the judgment is as final as one rendered after a case tried before a 12-person jury.

“Winning Without Trial” is an oxymoron. The figure of speech is contradictory, but the idea makes perfectly good sense.

Disqualify your opponent’s favorite judge, and you have your adversary reeling. Exclude evidence essential to your opponent’s case, and he or she is flat out of luck. You do not need a full-blown trial to achieve victory. Maneuvers such as moving for a new forum or moving to exclude evidence can deal a blow your opponent may never survive, just as a motion to dismiss or for summary judgment may dispose of the case once and for all.

These decisive strategies are the subject of this issue of Litigation. The advice is all here; it is up to you to use it wisely so that you serve your client’s needs and the ends of justice as well.
From the Bench

(Continued from page 4)

longer and more difficult you expect the negotiations to be, the more room you need to maneuver, adjust, and compromise. By contrast, if this clearly is your last chance to settle the case before trial, or if it is likely that the parties will reach agreement (or exhaust the possibilities) at this conference, your opening figure should be closer to the mark.

Suppose you have considered all these matters and still have doubts about what your opening figure should be. Err on the side of being near the figure that is in your heart. Unless your opponents are complete dunces, they are unlikely to be intimidated by an opening salvo that goes way over their heads. They certainly will not put all their money on the table and run (or, if you represent the defense, throw up their hands and agree to dismiss the case and pay your fees).

Instead, your exaggeration will encourage them to respond in kind. Furthermore, you will either bring settlement talks to an abrupt end or create noncommunication, distrust, and inefficiency as both sides meander through a series of proposals and counterproposals that have more to do with reactions to each other than with settlement. If you want the judge and your opponent will ascribe to the informed outsider would attribute to the negotiation, your opening figure should be within the range that a well-versed and experienced observer of each side's position. Too often lawyers fail to do this; they offer sketchy analysis and then simply announce their client's figure.

There are times, of course, when it is difficult to bridge the gap between the evidence and law and the value of the case. Nonetheless, it is important to offer reasons for taking a particular position or changing it. The tighter the reasoning, the more likely you are to impress the judge.

Except for those unusual situations where you must be rigid (usually because your client's feet are cast in concrete), your position should somehow signal flexibility to the judge (at least when your statement is confidential). The judge expects both sides to be flexible, and if you suggest otherwise, you will have lost one round in the gentle struggle to make the judge your ally. You need not imply that you will roll over and play dead; the message can be subtle. For example, you might state your client's position by saying: "For the reasons just summarized, at this time my client would be willing to settle the matter for $100,000." Other phrases that communicate flexibility are "at this juncture" or "based on what we have learned to date."

Another way to preserve room to maneuver is to cast your client's opening position in terms of a hypothetical settlement. You might write: "My client would be willing to consider something in the vicinity of $100,000 as part of a larger package if the defendants would add [specific additional elements A and B]." In framing your statement, do not suggest a number your client will not accept. If you say that your client would seriously consider an offer of $150,000 to $200,000, for example, the judge and your opponent will assume that your client will accept $150,000. Moreover, if this is the first figure you have put on the table, they are likely to assume that your client will accept an even lower figure, say $125,000. It is important to keep this in mind when you present your range.

Your first presentation is also the time to explain any unusual impact the settlement will have on your client. For example, if your client has cash-flow problems and the offer you are presenting strains the situation even more, you must stress this to the judge.

If in later presentations your client's position becomes less generous, explain why. A change that widens the gap between the parties can discourage the settlement judge from seriously trying to help the parties find common ground. Since such a change can hurt progress, you must try to justify it. You might also tell the judge that your client intends to review the matter after learning what the judge thinks. But, if you know your client will not budge, you must make that absolutely clear. The judge will enter the conference expecting movement on both sides, so if movement is not possible, you must give a warning.

White-Collar

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ing officers in a publicly held company to manipulate assets. But he will not give names, dates, or places.

Prosecutors often will consider these offers if the equities are sufficient—usually, that means that the prosecutors must feel they are not being asked to pass up the big fish only to net the minnows. Most prosecutors will qualify their acceptance of this offer on the absence of the "inievability factor," meaning that the acceptance is conditioned on making certain that the scenario provided by the lawyer is not already under active investigation by a criminal agency, such that it would inevitably find its way to the prosecutor's desk independent of the lawyer's effort.

The outcome of most trials is largely unaffected by the lawyer's skills. The overlooked truth is that some cases do depend on the lawyer's talents. The same holds true for repre-