

ON MEDIATION: To offer first or not?

By: James J. Mathie September 26, 2016 11:14 am

You've prepared for mediation as best you can. You know your strongest arguments and what your opponent will probably counter with.

You've discovered your client's interests and have a reasonable guess what the interests on the other side may be. You know your "best alternative to a negotiated agreement," also known as BATNA, and maybe even the other party's BATNA.

In other words, you're ready to go.

So should you make the first offer at mediation or wait for the other side? If you do take the first step, what kind of an offer should it be and what should it include? These are important questions and you should make it a point to think about them ahead of time.

There can be a big advantage to being the first to come out with an offer. That first step can operate as an anchor that can greatly influence both the coming negotiations and the final results.

At other times, though, going first can be a disadvantage. How do you know what's best?

Here is what the research suggests:

In a purely distributive negotiation — a zero-sum game — initial offers can have a significant anchor effect and can lead to a bargaining advantage. Anchors work for two reasons: People tend to adjust away from that initial figure, but don't adjust enough; and an opening offer tends to make information that is consistent with the anchor selectively accessible — meaning the recipient automatically thinks about what will support the offer.

The anchor effect is remarkably strong. Research indicates that the first-offer advantage can account for between 50 percent and 85 percent of the variance in final outcomes. It occurs regardless of cultural difference, power disparities and the number of issues that are present in a case. It occurs even when the negotiators are experts. That's big.

But it's important to remember that not all offers are created equal when it comes to the anchoring effect. The more precise an offer is, the more anchoring power it will have.

Think of it as being, well, an anchor. A round anchor won't grip on to much. In the same manner, a number that has been "rounded off" will not have as much anchoring effect as a more precise figure.

An offer of \$50,000 is not as strong as \$47,500. And if your plan is to make an ambitious first offer, then putting forward a precise figure will make it more plausible. Also helpful is to pair any first offer with consistent information that can be used as a support.

Anchors also operate in multi-issue negotiations with integrative potential. However, in integrative negotiations, in which the parties will prioritize those issues or in negotiations in which the parties may have compatible preferences, making the first offer can actually give rise to a bargaining disadvantage.

The Information-Anchoring Model of First Offers predicts when and why making the first offer helps and when it hurts. According to the model, first offers have two effects: They serve as anchors that pull final settlements toward the value of the initial offer; and they can convey information about the sender's preferences or priorities that can be exploited and thus create a disadvantage.



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Revealing a compatible preference in an opening offer can allow your opponent to pretend that an illusory conflict exists and to extract concessions on other issues before “reluctantly conceding.”

In an integrative negotiation, revealing integrative priorities can similarly enable the other party to gain an advantage by feigning that certain points are priorities when they are actually unimportant.

The ultimate consequences can depend on the social-value orientation of your opponent. Is he pro-self or pro-social? Is he looking out only for himself or is he concerned about mutual gains? The first-offer disadvantage can disappear with a pro-social negotiator on the other side but can be exacerbated with a pro-self negotiator. How well do you know your opponent?

So here are the considerations in deciding whether to make an opening offer:

What is being negotiated? Is it purely a distributive negotiation? If it is, make the first offer; be ambitious, precise and plausible; and pair your offer with consistent and supportive information.

Does the negotiation involve multiple issues that might be prioritized differently? If it does, then make sure that any first offer is ambitious, precise and plausible across the issues. Otherwise, though, be uninformative about how you would prioritize those issues, unless you know that you are dealing with a pro-social negotiator.

Does the negotiation involve potentially compatible preferences? For instance, the parties in a real estate transaction might all want an early closing date. When you know this is the case and you want to make the first offer, be careful not to reveal your preferences if you don't know those of the other side.

All this should help underscore the importance of preparation when you are going into mediation. It should also show the value of gathering as much relevant information as possible both before and during the mediation.

Following this advice can lead to the best possible outcome — perhaps even for both parties.

See you at mediation.

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