



The Importance of Expectations

By Amy Lieberman



Ask me why cases settle in mediation, and most of the time, I can't tell you the one reason. It's typically a combination of several factors: analysis of the risk of loss on liability, likely damages that could be awarded, concern about the cost of going forward, both economic and non-economic, the emotional toll of litigation, and concern about negative publicity. Sometimes there is just a plain and simple desire to be done.

But, ask me why a case does **not** settle in mediation. By contrast, I usually **can** tell you the one major reason: unrealistic expectations. As one famous philosopher said, "The greatest source of anger and frustration is unmet expectations." If expectations are unrealistic, a failed mediation is no surprise.

If an impasse is going to occur, don't you at least want to feel comfortable that your client has realistic expectations? And, if they don't, what can you do?

HOW ARE EXPECTATIONS CREATED?

Expectations come from several sources, only one of which is the legal advice you provide.

For the plaintiff, expectations are influenced by (1) legal counsel's analysis; (2) information on the Internet; (3) statutory damage limits; (4) pressure from significant others, and (5) the amount you put in the demand letter.

Plaintiffs often latch on to the maximum amount they have been **told they can recover**. They believe because they **might** recover \$1 million if they win, they are **entitled** to that amount in settlement. In other words, the equation looks like this: **Potential Recovery = Entitlement = Reasonable Settlement**. They hurt, they have been wronged and they want full compensation. They

suffer from an overconfidence bias, and any risk of loss analysis plays only a small part.

For the defendant, expectations are influenced by (1) legal counsel's analysis; (2) their own past history resolving or litigating similar claims; (3) actuarial information about jury verdicts and settlements of similar claims in the jurisdiction; (4) costs of defense, and often (5) past experience with plaintiff's counsel.

For a defendant, the equation could look more like this: **Potential Recovery divided by percentage of Risk of Loss = Reasonable Settlement.** Note that the equations are not the same.

TALK TO YOUR CLIENT ABOUT EXPECTATIONS

Many plaintiff's counsel come to mediation expecting at the very least to receive an offer equivalent to anticipated costs of defense. For business reasons, defendants are often willing to put that amount on the table. However, some do not take this approach.

In a recent mediation, after two years in litigation, a defendant offered \$6,000 at the end of the day. There was no incentive for the plaintiff to consider accepting an amount that low. The only reason to offer such a low amount is to lower expectations, and set the floor for an ultimate resolution in a range far less than what the plaintiff seeks at mediation. While this can work, everyone leaves the mediation frustrated and angry - with the process, with the other party and even with their own counsel and the mediator.

Parties desire a process that they perceive is fair. They seek "transactional utility." The value of this should not be underestimated, as research has shown that parties will often turn down a resolution that may be in their own best interest, if they do not feel the process was fair.

A client's perception of fairness is highly influenced by his or her expectations.

ADJUST EXPECTATIONS IN ADVANCE

Take steps to ensure your client's expectations are realistic and to help the settlement process before mediation.

1. FOR PLAINTIFF'S COUNSEL: Tell your client in writing that the written demand is **not** reflective of what you anticipate the ultimate outcome will be. Inform them to expect half that or even less. Warn them against anchoring to that number, and emphasize the risk of loss. Be specific about the "give and take" of the mediation process, so they do not expect to lay down one number they think is reasonable and have it promptly accepted. Explain the impact to your credibility and the likely reciprocal response if you start, and stay, unreasonably high. Call the mediator in advance, to let her know your client has unrealistic expectation so that she can tailor her input accordingly. Consider revising your fee arrangement so your client has some skin in the game. Suggest – in writing – that your client get a second opinion if they think you are not on target with your advice as to a reasonable settlement. This helps to prevent a malpractice claim, and conveys how confident you are about your analysis and advice.

2. FOR DEFENSE COUNSEL: Geographic location will influence expectations. At a recent mediation in San Francisco, the defendant's opening offer was in the \$20,000 range, and they directed me to communicate their belief that this was not a "six-figure case." Plaintiff's counsel responded, "Then why go to mediation? No one goes to mediation if they don't intend to pay six figures. Not in San Francisco, anyway." Know your opponent, and gauge the level of work plaintiff's counsel has put into the case to date. If your client is not one to consider costs of defense, and you expect that this will result in a nuisance offer, let plaintiff's counsel know in advance. Perhaps they may decide to forego mediation, but it will send a message and potentially help accomplish resolution later. Be sure to have someone with authority available for the entire length of the mediation, to meet the transactional expectation that each side is committed to the process for as long as it takes. And, document your advice in writing as well. If a patently reasonable demand is rejected, good business sense dictates that you want to be sure and avoid a malpractice claim in the event of a huge loss.