Mastering the Mediation Money Dance
By Jessica Notini

In most mediations occurring in a legal context, with attorneys involved, the participants at some point engage in the back and forth distributive bargaining, referred to here as the "money dance," in an effort to reach a final dollar figure settlement. This article is not intended to address the conversion of human complaints into claims for money damages within the legal system or the potential for more creative, interest-based approaches and solutions. This article is intended to improve effectiveness of participation in the money dance in the legal context and coordination with the mediator through better understanding of the psychology and purpose of the dance and the movements within it.

Why Dance At All?

You may wonder why it is necessary to "dance" at all- why not simply "cut to the chase?" Many less experienced negotiators are impatient with the concept of the "dance." You or the mediator can explain that the dance is based upon powerful and deep seated psychological forces that tend to operate upon us even when we are conscious of their potential influence. First, we instinctively desire a sense of "give and take" or "reciprocity" in a negotiation, usually seen in the form of concessions. Reciprocity has played an important role in human survival for millennia, as we help those who have helped us in the past. Thus, when someone gives us something, it triggers an almost automatic response to give back.

Concessions are described as "the language of collaboration" in negotiation. When someone does not make concessions in a negotiation, we describe them as playing hardball or failing to negotiate in good faith. This occurs even when an offer is inherently reasonable. The lack of movement causes us to *perceive* it as unreasonable. The wise negotiator leaves room for movement to prevent being perceived as unreasonable.

The dancing process also helps to manage the psychology of "reactive devaluation" which causes us to instinctively assume that anything the other side is offering must not be good for us since they do not have our interests at heart. Similarly, what they are holding back is probably highly desirable. The more quickly and easily the other side makes an offer or concession, the less we value it, particularly in a low trust environment. This occurs even when we would have assessed an offer as reasonable prior to entering the negotiation. In other words, if you had concluded that $150,000 would be a reasonable settlement amount before entering the negotiation, and the other side opens the negotiation with an offer of $150,000, most people instinctively believe

"there must be more" or "my claim must be worth more." We trust the result more if the other side has to make concessions, and we tend to be more satisfied with the final number if we had to *strive* to reach it.

Be Prepared for the Dance

Before walking into a mediation or negotiation, you and your client should know both your "high expectation" – a potentially achievable target number, and your "bottom line" or "walk-away" number. The high expectation or target should be justifiable based upon a realistic, albeit optimistic, assessment of potential outcomes in the legal marketplace, discounting for costs. Research demonstrates that commitment to and focus upon a specific and clearly defined target (e.g. I want to be paid $192,000.00 rather than "I'll try to get a much as I can") leads to increased striving and better monetary results. However, you should also have a clearly defined bottom line because it will frequently be necessary to move past the high expectation in order to reach settlement, and you will need to define the point at which your client would prefer to pursue alternatives to the negotiation (i.e. continued litigation). In other words, at what point does your client prefer no deal and whatever that entails.

Be Ready to Make Adjustments When You Hear the Music

Remember that targets and bottom lines often shift. Keep ears and mind open as you enter the mediation so that you can determine whether you need to make any adjustments, up **or** down. You should not be *pushed* off your numbers by a tirade or tactic, but should recalculate based upon new information, a more objective assessment of the case, more clear understanding of costs and risks etc. Remember that your assessment of the case is almost always too optimistic because of the human psychological tendencies to assimilate information in biased ways (we quickly notice and highlight that which favors us and overlook or discount that which does not). We are overconfident in our ability to "beat the odds," and tend to see ourselves as more intelligent and reasonable than the other side. A mediator's more objective perspective can be a valuable check on these common psychological influences. For example, the mediator may find the other side's tearful account to be moving and likely to sway a juror rather than obviously false and manipulative. Wise counsel will invite this kind of reality testing and weigh the mediator's input carefully, resisting the tendency to automatically reject unfavorable views.

Don't Start Dancing Too Early

As they say, timing is everything. One of the quickest roads to impasse is to start bargaining too soon. Whether conducted in joint session or caucus, the early phases of a mediation or negotiation should be used to increase understanding of the facts and client interests on both sides, test assumptions, assess your counterpart (credibility, persuasiveness, effectiveness of representation etc.) and gain information that may influence the money dance. Consider more use of joint session so that you and your client can better evaluate the other side directly, and use the opportunity to make an impression upon them that will cause them to reset *their* high expectations and bottom lines in your favor, whether through emotional appeal, strong (but not offensive) legal arguments, improved understanding of the data or other means. You may also reduce some of the tension in the money dance if you have improved relations and/or found other ways to create value. It is not unusual for people to become more "reasonable" in their settlement posture when they feel they have been acknowledged or have reached better understanding of each other.

Consider Who is Dancing

The dance varies depending upon the style and skill of the participants and their relationship with each other. If your counterpart is known for or appears to have an aggressively competitive style, and you have little trust, you should be prepared for more extreme positioning and a longer dance. If you and your counterpart have some trust and are more collaborative, you may want to start more reasonably and proceed more efficiently. The mediator can be a valuable source of information in this regard if he or she has worked with some of the participants previously, and the mediator may be able to temper the approach of less effective negotiators by educating them in the bargaining process, usually while in caucus.

The Opening Moves in the Dance Are Critical

First impressions are highly influential. Careful consultation with the mediator regarding who should make the opening move, what the opening parameters should be on both sides and how to present them can be very important. If offers and counteroffers have already been made outside of the mediation context, they are often considered unrealistic for settlement purposes and it is common to reset parameters for purposes of the mediation.

A poor opening move or a rash public announcement of a "bottom line" can significantly increase the potential for impasse. One of the root causes of this is the psychology of "cognitive dissonance" which makes it difficult for a person to back off of a previously stated position without

feeling a sense of internal conflict. The other basic problem with drawing a line in the sand is the obvious potential for loss of face and credibility with the other side if you later cross that line.

> *Example Scenario:*
> *You state firmly that you could "never accept less that $200,000." When questioned about this, you repeat, that there is "no way" to go lower than $200,000 and you would "absolutely not" consider a dime less. Perhaps you even believe it at the time you state it. Later, you see reason to accept less, but it puts you in "dissonance" with yourself to now say "yes" to a lower figure and you find it hard to back down in front of opposing counsel.*

For this reason, most mediators will want to work with you in private session to plan the money dance and will attempt to reframe publicly stated hard lines in ways that allow flexibility and movement, or create face-saving escape routes. Wise negotiators will likewise refrain from inviting opposing counsel to repeat and entrench bottom line statements. You don't want to push them into corners that are unfavorable to you and your client but rather help them find a way out.

As you move into the money dance, the mediator will typically work with you to assess: (1) whether your opening number leaves sufficient room for concessions in light of your target, your bottom line and the relationship context, (2) whether your opening, target and bottom lines are reasonably justifiable based upon available data and your alternatives analysis (i.e. typically compared to likely outcomes in court), and (3) how the other party is likely to perceive and react to your opening.

> *Example Scenario:*
> *Your alternatives analysis suggests that the most probable outcome of litigation is a total recovery of between $130,000 and $230,000, but the high end of that range is unlikely. Based upon this analysis and your client's input, you might set a "high expectation" or "target" for the mediation of obtaining $195,000, and you might set your bottom line at $150,000. Entering the money dance, you might start with a number such as $250,000 (presenting data which makes this optimistically justifiable and leaving room for concessions as you move towards your target). You might not start as high as $300,000 if you were worried this would be too offensive to the other side and hard to justify, even optimistically.*

You will need to decide how forthcoming to be with the mediator about your "real" targets and bottom lines based upon your familiarity

with the mediator's style. The danger in being too revealing is that a mediator aware of your true bottom line may unwittingly leak it to the other side or push you towards it from their own investment in achieving settlement. The danger in being too guarded is that you may impede or eliminate the mediator's ability to help you discover the potential "zone of possible agreement" ("ZOPA").

> *Example Scenario Cont.:*
> *You tell the mediator privately that your target is $220,000 and you could never settle for less than $185,000. The other side tells the mediator that their target is $100,000 and they will never offer more that $140,000. Both sides bluff so effectively that the mediator loses hope for settlement and never discovers that there was a zone of possible agreement between the "real bottom lines" (you would have accepted as little as $150,000 and they would have offered as much as $160,000)*

An experienced mediator will usually use some method of analyzing potential litigated outcomes (including best and worst case scenarios, with associated costs and probabilities) both to assist in setting the parameters of the money dance and to provide a serious reality check on each side's walkaway number. Some mediators will focus primarily on eliciting the case analysis from counsel on each side and will use opposing counsel's analysis as a check on each side. More evaluative mediators may also inject their own analysis as a check on both sides.

The exploration of potential litigated outcomes is an opportunity to use the mediator to help you educate a client with overly optimistic expectations, explaining that this private, *realistic* case evaluation is intended to enable *informed* decision making, and may look quite different than the more favorable evaluation that might be presented in a joint session. Sharing your realistic case assessment with the mediator does not necessarily reveal your bottom line. Mediators understand that the alternatives analysis is not the only variable that influences a client's decision regarding an acceptable settlement.

> *Example Scenario Cont.:*
> *In joint session, you highlight the possibility of a court award of $290,000 even though the probability of this outcome is minimal. In private session, the mediator works with you to educate the client as to the range of possible outcomes (e.g. approx 40% chance of $230,000, resulting in $190,000 after deducting $40,000 in attorneys fees, approx. 40% chance of $190,000, resulting in $140,000 after attorneys fees, and 20% chance of $130,000, resulting in $90,000*

after attorney fee). The mediator might use these predictions to test whether a bottom line of $150,000 was reasonable given the 60% probability that the client would end up with less after litigation.

As you work with the mediator to develop opening parameters, keep in mind that the mediator will be your messenger in the money dance, assuming that it is conducted in the caucus format preferred by many attorneys. Therefore, it is critical that you ensure that the mediator is prepared to make a strong presentation of your proposal, with a clear understanding of the justifications for all elements as well as any "signals" you want conveyed to the other side. Occasionally, it is preferable to return to joint session, even if only temporarily, when you or your client will more effectively explain certain data or rationales. In cases where there is a need for on-going relations between the parties, you may want to consider using a mediator skilled in the management of joint sessions and conducting most or all of the negotiation in joint session, including the money dance. Sometimes, it is hard to dance with someone who is in the other room.

Example Scenario cont.
Your alternatives analysis suggests that you could make an optimistic but justifiable argument that your client would be entitled to $150,000 in "hard" damages (e.g. identifiable and documented expenses – usually most persuasive in mediation), $60,000 in "soft" damages (e.g. emotional distress) and an additional $40,000 if you win a certain amount of interest, attorneys fees and other less likely claims. The mediator will be best able to present this number as your first demand if you have provided clear data supporting the $150,000, legal research showing that your $60,000 assessment for emotional distress is within normal parameters for this type of case and any arguments/evidence to support the $40,000.

Should I lead or follow?

If you have a choice, there are several considerations in deciding whether it is desirable to put forth the first number including: (1) common practice (e.g. "plaintiff should make the first demand"), (2) confidence and information, and (3) desire to set a particular tone or use anchoring strategy. In the absence of information or confidence in probable legal outcomes, many negotiators are reluctant to take the risk of "bargaining against themselves" by going first. However, if you feel confident in your information and legal analysis, you may want to take

advantage of the psychology of "anchoring." The first number on the table, when chosen wisely, pulls the dance significantly in its direction. It is difficult to resist this effect even when you are aware of it. However, if the first number is seen as offensively extreme, it loses this effect and may even have a reverse rebound effect, either resulting in impasse or an outcome that "punishes" the offender.

> *Example Scenario Cont.*
> *Opposing counsel feels confident in her understanding of the case law and probable outcomes (as well as what it will cost your client to litigate). Accordingly, she puts an offer of $90,000 on the table before you make your first demand. It is now psychologically more difficult to respond with the $250,000 opening previously considered, and many will unconsciously respond to the anchor by starting lower (e.g. $230,000). However, if opposing counsel tried to anchor ineffectively by starting with an offensive and unjustifiable offer of $30,000, she may be more likely to provoke a walk out or an extreme retaliatory response (e.g. $300,000)*

If you follow in the dance, be aware of anchoring and resist its' tendency to pull you off of your intended plan. Your main considerations are still justification of your number, leaving room for concessions and accounting for the reaction of the other side. However, you when you "follow," you have the additional consideration of "the midpoint rule." Intuitively, most people expect a money dance to end up somewhere near the midpoint between the first two numbers. You are setting the midpoint when you put the second number on the table. You may not always be able to counter justifiably in a way that sets an acceptable midpoint, but you should at least be aware of the midpoint psychology and account for it in your next steps.

Coordinating the Dance

It is difficult to dance effectively if *you* are doing the "twenty-step, creative lambada" and the *other side* is doing the "two step polka" or the "first and final offer" stonewall routine. Toes will be bruised. Use the mediator to help identify the expectations on both sides regarding the form and timing of the dance. If expectations are very different, the mediator will usually attempt to coach the parties in some of the standard steps that will prevent stepping on toes and crossed signals.

> *Example Scenario cont.*
> *In response to opposing counsel's opening offer of $90,000, you asked for $250,000 as you originally intended and*

resisting the effects of anchoring. Opposing counsel is unfamiliar with the bargaining process and suggests "cutting to the chase" with a firm, fair and final offer of $145,000 (i.e. doing the two-step polka). The mediator should educate opposing counsel regarding the danger of this move, which is likely to be seen as a "resetting of parameters" rather than a truly final offer, with subsequent resentment and likely impasse when no further movement is forthcoming.

Dance Interpretation - Reading the Signals in the Moves

A good mediator should be able to help you interpret the money dance, attempting to read between the lines to "smell ZOPA." This is often needed because not every dance proceeds in standard fashion and inexperienced dancers or dancers with different styles may make moves that are hard to interpret. The mediator may coach the parties to try to standardize the dance to some extent, as discussed above, but the mediator cannot dictate their moves.

One useful guideline, as stated previously, is that the zone of possible agreement is usually in a range that can be predicted as near the midpoint between the first two opening numbers on either side, *assuming* that both of those starting numbers are reasonably justifiable. Many mediators will start referring to that range once it has been identified as a way of testing the existence of ZOPA and preparing parties psychologically to come to terms with a final number that is initially upsetting and objectionable. If you are aware that the midpoint range would never be acceptable to your client, you should make the mediator aware of this as soon as possible and work with the mediator to develop a concession pattern, with associated communications, that will send the appropriate signals to the other side.

Example Scenario cont.
Based upon the opening moves of $90,000 and $250,000, the midpoint is $145,000, and the mediator might predict a ZOPA in the range of $135,000 - $155,000. If the mediator felt that one side had started more optimistically than the other, the mediator might shift the predicted range in the direction of the party who started more reasonably. Note: most attorneys believe they have started much more reasonably than the other side.

Another useful tool is to use a pattern of gradually diminishing concessions that signal an endpoint and examine the pattern of the other side for such signals (note that a series of identical concessions provides little information about a probable endpoint). Keep in mind, however,

that early signaling is likely to be more focused on an endpoint targeting high expectations, and there may be additional concessions beyond the first "endpoint" that move in the direction of the bottom line. A mediator may be able to give you some sense of whether the other side is truly "hitting the wall" or is operating strategically.

As in the opening moves, you should discuss with the mediator the timing, pattern, size and justification of concessions to ensure that you are sending the signals you intend to send. Concessions that are too large may signal weakness, too small may trigger hopelessness or resentment and too quick may trigger concession devaluation (i.e. "it must not be worth much if they offered it so easily"). You should also consider whether you can provide persuasive rationales for your concessions so that the other side does not expect you to succumb arbitrarily to pressure to move off of your last position.

> *Example Scenario Cont.*
> *If opposing counsel moves from $90,000 to $100,000, then to $110,000, then to $120,000, and so on, it is difficult to predict where she will stop. The only information available is the size of the concession, and there is no apparent basis for these concessions other than avoidance of the risks of litigation. If you move from $250,000 to $230,000 (based upon elimination of your claim for attorneys fees), and then to $215,000 (based upon a reduction in your emotional distress claim), and then to $205,000 (based upon elimination of any weaker claims such as interest), you appear to be targeting a number near your high expectation of $192,000, and you appear to be negotiating from principle. You have also started the dance with a larger move, likely to create good will on the other side. Opposing counsel's relatively small first move of $10,000 (up to $100,000) is likely to provoke negative reactions and fear of impasse, although this might be tempered later as the series of identical concessions continued.*

As you proceed with the dance, the mediator should be assisting you with management of client reactions. Frequently, clients are dismayed by optimistic opening moves. They also have a tendency to fall prey to "my concessions are bigger and more meaningful than yours" mentality. It is important to be aware that clients are not only interested in their own monetary results but are also concerned about the *comparative* results of the other side and a sense that the outcome is "fair." In fact, the "psychology of fairness" is so strong that reasonable people will reject an objectively acceptable settlement amount in order to punish a party they perceive as overreaching and acting unfairly. The

mediator should help you check whether concessions are acceptable in light of the need for reasonable reciprocity, objective comparison to probable litigated outcomes and the predicted ZOPA. The mediator may also remind the client to watch out for the human tendency to define "fairness" in self-interested ways and to try to refocus on desired outcomes rather than punishment.

Watch Out for Dangerous Backstepping

Making a move that appears to move away from ZOPA, retreating from prior offers, is highly inflammatory. It may occasionally be necessary to backstep based upon discovery of significant new information, increases in costs or miscalculations in prior offers, but this is almost always seen as bad faith negotiation, causing serious damage to trust. If backstepping cannot be avoided, give the mediator as much notice as possible and prepare for fancy tap dancing to explain the need for it and manage reactions from the other side.

The Closing Moves

The final steps in the dance can be the hardest when there is no ZOPA, or the perception is that there is no ZOPA. Here, the mediator should help you assess whether the timing is right for final offers and what method might be best to cross the last gap, such as a suggestion to "split the difference," a final principled concession, a "mediator proposal," etc. If impasse seems likely, ask the mediator to help you assess the cause so that you can choose a method for overcoming it such as a return to joint session, sharing more information, review of the alternatives analysis, or renewed efforts to create value in other areas.

If you reach agreement, the best practice is to contractually record it as soon as possible, while all are still present and able to work through any areas of ambiguity or uncertainty, and to prevent backsliding. If you do not reach agreement, you will significantly increase your settlement rate if you find ways to "keep the door open," allowing for reconvening or continued negotiation another day (e.g. following another deposition, review of additional case law, communication with higher authority etc.). Clients often need time to come to terms with new information, harsh realities revealed and emotions triggered during the negotiation process. Finally, keep in mind that critical goals during this final phase are clarity of and commitment to outcomes.