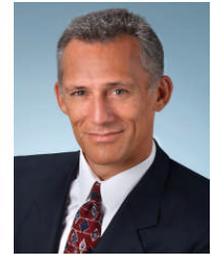


Bottom Line Negotiating: How A Little Negotiating Wager Can Break That Settlement Impasse . . . Or Make You Money Trying

by Michael D. Young*



"I am sick of the dance and I'm sick of you" barked Mr. Arthur Radley, president of Big Talk, as he began to stuff his small stack of papers back into his worn leather bag. The mediator was not certain whether it was he or Dill Harris, the plaintiff in this mediation, who was the intended target of the invective and accompanying jet stream of malodorous breath, but thought it best not to ask just then. As he prepared to walk out of the mediator's conference room with his attorney in tow, Radley continued: "Your case is lousy, Dill, and no jury in its right mind would ever see fit to award you more than the \$10,000 I have on the table." And then, creating music to the ears of defense attorneys everywhere, Mr. Radley concluded with: "I'd rather pay my attorney to defend this case than to pay you a penny more."

Not to be outdone, Dill Harris pounded his own fist on the table and barked back: "Don't bet on it, Radley. I can't wait to see your face when the jury returns with a \$150,000 verdict." Harris' attorney closed his briefcase with a little more energy than was really necessary, and put on his loud "I'll see you in trial" face. Both contingents headed for the door.

The experienced mediator had seen it all before, of course. Indeed, it was Mr. Finch's reputation for handling difficult and personal disputes that had led the parties to seek out his help in the first place, though his seeming inaction at this erupting crisis was raising doubts in the minds of the attorneys. However, just as the parties were filing past him towards the door, the mediator quietly asked, with but a hint of a smile on his lips, "Anyone willing to place a bet on this one?"

The parties stopped, not sure what he meant. "I'm serious," said the mediator, pushing his rimless glasses to the bridge of his nose while turning in his seat to face the four. Displaying the gambler's sparkle in his eye, his smile no longer a hint, Ol' One Shot Finch (as the mediator was known to his friends) continued: "Are you each so sure about the value of this case that you are willing to put a little money down?" Mr. Radley, who used to brag that he mortgaged his house and his wife to build More Talk into the industry leader it is, now looked intrigued. His former friend and publicist, Mr. Harris, was downright inquisitive. The lawyers, curious as to what Mr. Finch had up his sleeve, nevertheless had on their faux "I've heard this all before" look, lest they appear too eager to settle. "Sit down, all of you. Please," invited the mediator, passing around the plate of donuts. "I have a little proposition you might find to be of interest. I call it 'Bottom Line Negotiating.'"

Skeptical, but too curious to leave, the two businessmen took their seats, followed closely by their equally curious attorneys (still wearing their faux boredom faces). The mediator waited until they were quiet, and then poured himself a long slow glass of water to wash down his sugar encrusted Krispy Kreme. With four pairs of eyes upon him, and silence filling the room, he began:

"Mr. Radley, you think there is no way a jury will award anything, let alone some figure over \$10,000, am I right?" "You are," replied the Big Talk president with a wink to his legal counsel. "And you, Mr. Harris, think a jury would have to be out of its mind to award you anything less than \$200,000, true?" The plaintiff looked to his attorney, and they nodded together. "And as we discussed earlier, you both figure to spend anywhere from \$10,000 to \$30,000 after today in order to try this case. Fair statement?" More nods, this time just from the attorneys. "And neither one of you is interested in moving off of your respective settlement numbers, right? And why should you. If you are both so sure of your prediction of what the jury will do, you would be stupid to give in to the other side right now." Mutters of "you got that right" could be heard from around the room.

"So here's my proposition to you two businessmen," continued Finch, reaching for the bowl of Jelly Bellies. "Put your money where your mouth is. Let's agree right here and now that the party whose settlement position turns out to be the farthest away from the ultimate jury verdict must pay \$20,000, a rough estimate of the attorneys fees, to the party who turns out to be closer. In other words, we'll define the 'prevailing party' as the one who best predicts the jury verdict, and he will be entitled to \$20,000 in 'attorneys fees' from the other."

The parties considered this for a moment. Mr. Radley, skipping the jelly beans and reaching instead for a handful of chocolate covered raisins, did a little mental math and then whispered confidentially to his attorney: "I could make money on this deal! If the jury comes in where you say it will, I may not owe old Harris there a penny, but he'll owe me \$20,000 for being right all along. And if the verdict comes in anywhere under 80 grand, I get 20 grand back. I like it. Hey, you are confident about the value of this case, aren't you counselor?" "Uhhhhh, we'll talk," was the sage reply. Mr. Harris, reaching for the bowl of gourmet malt balls, had a similar thought. Pulling his attorney aside, he quietly murmured between bites: "Twenty grand just for being right? I'll even give you a cut. We are going

Continued from page 1

to win that much, riiiiight?" "Well, nothing's guaranteed, you know," back-peddled the counselor.

Dipping his chocolate biscotti into his cappuccino, Mr. Finch allowed the parties to discuss, consider, and contemplate the plan. When the concept had been fully digested and accepted, Ol' One Shot added one last twist: He told both parties to go back to their offices, do whatever additional jury verdict research, factual investigation, legal research, and soul searching they might want to conduct and then come up with a new number. "The new number," instructed the mediator, "should be your new best prediction of what the jury will award. It can be the same number you have given today, or it can be a different number . . . just in case your efforts later lead you to reconsider. Regardless, the new number must also be a number you will agree to accept or pay in settlement." As he escorted the parties and their attorneys to the elevators, Finch thanked them for their hard work, and left them with their final directions: "Fax me, and only me, your numbers by tomorrow noon. I'll enter them into the agreement, and circulate it for signature."

As Finch secretly predicted, there was no trial. Mr. Radley, wanting that \$20,000, instructed his attorney to get as realistic as possible. After reviewing the jury sheets, and refactoring the unpredictability of juries, Radley and his attorney decided to hedge their bet a bit and faxed to the mediator a \$40,000 prediction/offer. Mr. Harris, also wanting the \$20,000, had the same conversation with his attorney, reconsidered the likelihood of success before a local jury, and faxed to the mediator a \$90,000 prediction/offer. Armed with these numbers, the mediator engaged in a little Stealth Mediation, made a few phone calls, sent a few e-mails, and before you knew it, helped the parties agree to settle the case at \$65,000.

What happened here? Simple really. Finch set in motion something no more sophisticated than a self-inflicted reality check. The mediator provided a process which encouraged, indeed rewarded, the parties to be as realistic as possible about the "trial value" of their case (i.e., what the trier of fact, be that judge, jury or arbitrator, would likely award). The parties took it from there. In the example above, the parties closed the gap enough to allow the mediator to finish the job. In other examples, the parties may still be too far apart to allow for settlement, in which case there will be a trial, and one party will end up paying a portion of the opponent's attorneys fees.

Bottom Line Negotiating sounds a little like gambling. Each party in the example above is betting that he will be able to predict the outcome of a jury trial better than his opponent will. The winner gets \$20,000. Maybe it is gambling. But if so, it has a long and healthy acceptance in our legal system.

Consider baseball arbitration. Made popular by its use in resolving disputes between professional baseball players and team owners, baseball arbitration rewards the party who submits a "final position" to the arbitrator that is the closest to what the arbitrator thinks is fair. The arbitrator under that model must select either the salary figure proposed by the player, or the one proposed by the team owner. Since the arbitrator has no other discretion, he will select the submission that most closely mirrors his view of fairness (i.e., the "market value" of that player's services). The parties gamble that they can predict the arbitrator's notion of fairness better than their opponent can, and thus "win" by being awarded a more favorable salary. This process is designed to incentivize the parties to submit realistic proposals: if a player asks for a figure that is well above market while the team submits a proposal that is only slightly below market (as defined by the arbitrator, of course), the team will win the gamble while the player will end up with the low salary offered by the owner (and Scott Boras' phone will be ringing with a new client). Conversely, if the owner tries to "lowball" the utility infielder, the club may end up with a payroll rivaling the Dodgers, though with personnel resembling the 1962 Mets.

The courts are in the business as well, incentivising parties to take realistic positions in the name of encouraging settlement. For instance, Rule 68 of the Federal Rules of Civil Procedure (available to defendants), and Section 998 of the California Code of Civil Procedure (available to all parties), both provide litigants with a chance for a financial reward for making realistic settlement offers, and a risk of a financial cost for turning them down. Under both systems, the party who turns down a statutory settlement offer, and then fails to do as well at trial, can be ordered to pay certain costs or fees of the opponent. In other words, by rejecting a statutory offer to compromise, a party is gambling that the eventual trial verdict will be better for him than the offer. The amount he has at risk is what it will take to compensate his opponent for the particular costs provided for by the statute or rule. If the party guesses wrong, he must pay.

The goal of the statutory offer procedure is, as in baseball arbitration, to facilitate settlements by encouraging parties to make realistic settlement offers, while discouraging unreasonable refusals. Bottom Line Negotiating does the same thing . . . only by agreement of the parties and with potentially much more at stake. The parties select the consequence, or payment amount (which should be enforceable as a contractual attorneys fee provision), and in essence challenge themselves to seriously and realistically evaluate the "trial value" of the case. In the hands of a talented mediator, or the parties themselves, this gap-narrowing exercise could very well provide the breakthrough necessary to settle the dispute.

Bottom Line Negotiating worked for the litigants in the fictitious *Harris v. Radley* not simply because the author wanted a nice example to start off this article. There were certain characteristics of the hypothetical dispute that led the talented Mr. Finch to believe he had a candidate for this process. These included:

An Apparent End to the Negotiations: Radley and Harris were done negotiating and were prepared to go to trial. Had they still been exchanging numbers, Bottom Line Negotiating would have been premature. In other words, if the parties are still dancing, there is no need to stop the music. It is only when they either collapse (or at a minimum, start griping about how their "partner" keeps stepping on their feet) that the mediator (or parties themselves) might call an end to the dance and introduce the dice.

Bargaining Based on Money: The simplest use of the Bottom Line Negotiating process is with disputes in which only money is at stake, the amount is in dispute, and unless the parties settle, a finder of fact will eventually make a binding determination as to the amount. For those familiar with the negotiating lingo, the process appears best suited for distributive zero-sum negotiations (i.e., negotiations over an amount of money, where each dollar gained by one party is a dollar lost by the other). This is not to say that the model cannot be adapted to work with integrative or interest-based negotiating, or disputes involving issues other than money, but the adaptation will take some creativity.

Parties Motivated By Winning: Bottom Line Negotiating may have an increased appeal to parties who either appreciate a challenge, like the business-minded Radley, or who are motivated by "winning." It challenges these disputants to beat their opponents and rewards the "winner" financially. However, Bottom Line Negotiating changes the focus of the contest from "who can grab the most of the pie," to "who is better at realistically evaluating and quantifying a known risk." And by redirecting the end-game to reward the party who can best predict what a jury (or judge or arbitrator) will award — in other words, by rewarding the party with the most realistic settlement position — this process exploits the competitive spirit to actually narrow the gap between the parties' positions.

Parties Present With Authority To Take The Risk: For Bottom Line Negotiating to work, both parties must be willing to increase their risk at trial! After all, it is the increased risk at trial that provides the parties with the incentive to reconsider their last settlement offers, and to evaluate their cases more realistically or objectively. If a negotiating representative has no authority to increase the risk to her principal — one could imagine an insurance adjuster or governmental representative fitting this profile — the representative will either need to get authority, or prepare for trial.

Parties With Relatively Equal Ability To Evaluate

Risk: In *Harris v. Radley*, the case was ripe for Bottom Line Negotiating since both parties were represented by counsel capable of evaluating the risks of trial and the "trial value" of the case. However, not all negotiated disputes are as equally balanced. A dispute over the dissolution of a partnership, for example, is a candidate for this process, but only if both parties have financial experts and access to the partnership's financial data. Each party must feel comfortable that he or she has the information and expertise necessary to make an informed prediction of the "trial value" of the dispute (or at least have no worse information and expertise than the opposition).

Bottom Line Negotiating is a tool. Used properly, it may bring about a settlement. Or, it may reward the good faith negotiator at the expense of the hardball, unrealistic negotiator. It can be used by mediators (with the consent of the parties) as an impasse-breaker (possibly to be followed by a Mediator's Proposal or some other closing technique), or it can be used by the parties and/or their attorneys themselves. And while Bottom Line Negotiating depends upon an estimable-but-unpredictable binding adjudicatory process to follow, the nature of that adjudicatory process (i.e., jury trial, judge trial, arbitration) is not that important.

Bottom Line Negotiating is not the answer to all negotiating impasses. However, it may prove exactly what is needed to get past certain negotiating barriers, or provide some recourse to the erstwhile negotiator when faced with an unrealistic litigation opponent.

This article originally appeared in The Federal Lawyer, and John C. Cooley's Creative Problem Solver's Handbook For Negotiators And Mediators (published by the ABA Section of Dispute Resolution), and is used with permission.

* **Michael D. Young** is a partner with Alston & Bird in its Los Angeles office where he heads the California labor and employment practice. He is also a mediator with Judicate West focusing on intellectual property and employment disputes, among other complex civil matters, and a Distinguished Fellow with the International Academy of Mediators.