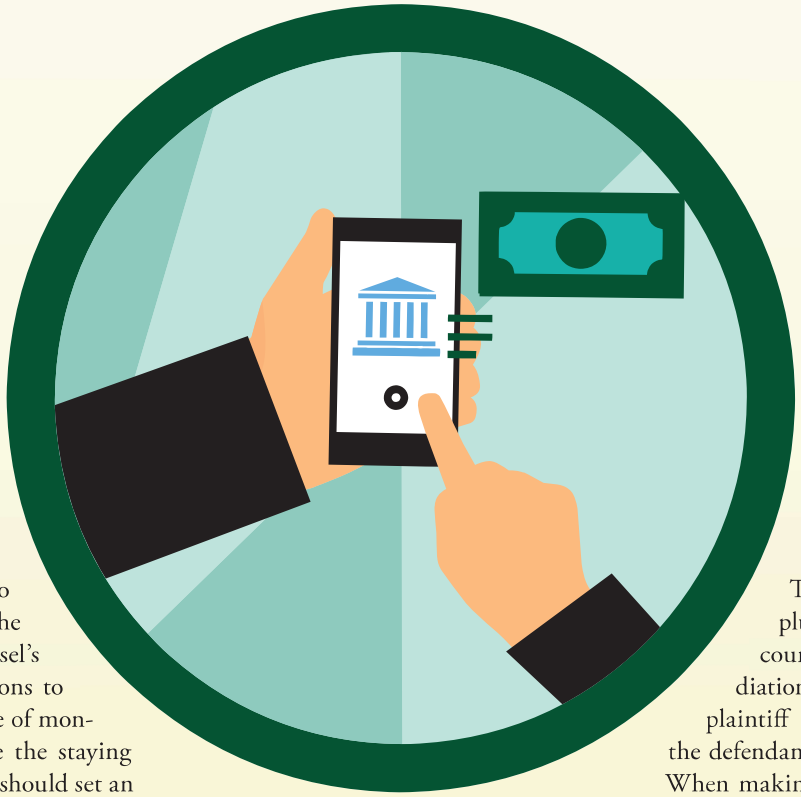
PAY NOW OR PAY LATER: A MEDIATION STORY

by MICHAEL G. BALMAGES



There are many reasons not to settle your case now. From the defendant or defense counsel's perspective, numerous reasons to press on include: The time value of money. The plaintiff does not have the staying power. We can defend this. We should set an example. I'd rather pay my lawyer than pay that jerk anything. It's a matter of principle! These are all good reasons.

And there are also numerous reasons why the plaintiff or plaintiff's counsel do not rush to settle their case: We can win this. I don't want to discount my claim. We can't let that jerk get away with this. We're in no hurry, we can wait it out. We have to go to trial to maintain our credibility. It's a matter of principle! Despite all these good reasons, in the Orange County Superior Court, almost all civil cases settle before trial. (There do not seem to be definitive statistics on the percentage of civil cases that settle before trial, but several judges have informed me that they think the percentage is greater than 98%.)

As a business trial lawyer for more than forty-five years, a mediator of more than 500 cases, and a settlement judge at more than 1,000 Mandatory Settlement Conferences (MSC), I have observed a phenomenon that occurs in many settlements. Usually early on, one party or the other makes a settlement demand or offer that is dismissively rejected by the other side; and three months, six months, one year, or even two years later, the case settles at or about the amount of that original demand or offer. In the interim, between the initial demand or offer and the settlement, the parties have collectively spent many thousands of dollars on legal fees, expert witnesses, and deposition reporters, only, as noted, to settle the case for about the same amount that they could have settled for before all that money was spent.

An Americans with Disabilities Act case that I recently mediated is an example. In September, counsel negotiated the following: The plaintiff demanded $50,000, plus remediation; the defendant countered at $15,000 with remediation; and after a series of steps the plaintiff came down to $42,000 and the defendant upped their offer to $24,000. When making the $42,000 demand, plaintiff's counsel sent an email to defense counsel saying that the $42,000 was a discounted demand meant to get the case over with now, and that the plaintiff would never accept anything lower than that. Despite this admonition from the plaintiff, the defendant sent a counter-offer of $29,000. Plaintiff's counsel responded with an email saying that he had already said that the plaintiff would never accept anything less than $42,000. Defense counsel responded to that email with another offer, this time at $30,000. Plaintiff's counsel did not respond. One month later, an associate in defense counsel's office wrote to plaintiff's counsel saying that they had not heard back from him on the $30,000 offer. Plaintiff's counsel responded that he had already told them, several times, that plaintiff would not take less than $42,000.

Over the following four months, the plain-

tiff consulted with his expert, responded to written discovery, and attended a Case Management Conference (CMC). At the CMC, the court asked about settlement. Plaintiff's counsel responded that they were at an impasse. Defense counsel said that she would work a little more on her clients and they should be able to get it settled. The court seized on this and ordered them to mediation. Hence, the case came to me.

At mediation, plaintiff's opening demand was $60,950. I told plaintiff's counsel that this would not sit well with the defendant who would protest that the plaintiff was higher than when they last left off negotiations, and that defense counsel would say the plaintiff was not at the mediation in "good faith." This, of course, is exactly what defense counsel said. Plaintiff's counsel responded to me that he had told defense counsel that the $42,000 was a discounted amount and that he now had more time and costs into the case. In response to the $60,950 demand, the defendant offered $30,950, a $950 increase from their last pre-mediation offer, and which "paralleled" the plaintiff's $60,950 demand. I told defense counsel I did not think this would be very productive. Still, counsel did not budge. I took the $30,950 to the plaintiff who said he would lower his demand by $950 to $60,000. I advised against this. I told him that I knew (sensed) that the plaintiff would take somewhere around $50,000 to settle (to which plaintiff's counsel did not respond) and suggested that he ignore the defendant's game-playing and make a substantial concession to get the process going. The plaintiff heeded my advice and went to $56,000.

I took the $56,000 to the defendant who was pleased with the progress but upset that the plaintiff was still above his $42,000 pre-mediation demand. Defense counsel told me the defendant would raise their offer by another $950 to $31,900. I told counsel that I did not think that would be helpful, and that it might even end the negotiations. She demurred and said that the defendant had already once moved up $950 and plaintiff had come down $5,000 in response, which to her proved how wrong I had been in saying that the first $950 would not be very productive. She insisted that the plaintiff would come down another $5,000 in response to this second $950 move. I said that the plaintiff would not. I was right.

I conveyed the $31,900 to plaintiff's counsel, who predictably responded that the mediation was over. There was no point in going forward; the plaintiff would not respond to the $31,950. I asked plaintiff's counsel to stick around and then probed to find out what the plaintiff's bottom line might be. It was right around the $50,000 I had previously sensed. I asked counsel whether the plaintiff would settle if I got the defendant up to $48,000. After a lot of hemming and hawing and consultation with his client, counsel told me that the plaintiff would. I asked if I could take that to the defendant as a "last, best, and final?" Counsel said that I could. Note: "Last, best, and final" demands or offers generally aren't "last" or "best" or "final," but in this case I believed plaintiff's counsel meant it. He did.

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I took the $48,000 last, best, and final demand to defense counsel who conferred with the defendant for quite a while and came back to me with defendant's own "last, best, and final" offer of $42,000—*the amount of the plaintiff's demand from several months earlier*. I told defense counsel that the plaintiff would not accept it, but that I would convey it. Before I did, however, defense counsel asked to talk to me alone, outside the presence of her clients. When alone, she said she wanted me to convey the $42,000 as a "last, best, and final," but she did not want the plaintiff to withdraw the $48,000.

To provide some more context, the defendant had two lawyers present (via Zoom) for the whole mediation, which stretched over six hours. One lawyer was in San Francisco and the other in Chicago, both partners in large firms. Figuring that each lawyer was charging at least $700 per hour, the defendant spent at least $8,400 in legal fees on the mediation alone. The defendant also had three of its officers present (again by Zoom): two in Rome and one in Chicago—all to argue over what was initially a $12,000 difference in demand and offer, as remediation was not really an issue.

I conveyed the defendant's $42,000 "last, best, and final" and it was rejected. The mediation was over. The next day I received an email from defense counsel asking me to tell the plaintiff that they would pay the $48,000. I did, and the case settled there.

Why did this happen in this case, and why does this often happen? One reason is the "pain of litigation." Often, when the initial offer or demand is made, one or more of the parties has not sufficiently felt the monetary loss, time wasting, and emotional pain of litigation. Later, after they have experienced it, settlement seems so much smarter. Inherent in this is the lawyers' frequent failure to convey to their clients just how expensive and painful litigation really is. Another is lawyer bravado, or the lawyer's inability to admit that the other side might have a good case or a good defense. We lawyers like to feel invincible, and even though our retainer agreements say we do not guarantee success, we do not always act consistently with that. And, of course, there are all the other reasons discussed at the beginning of this article.

Throughout the mediation discussed above, which started out as a $30,000 difference, I kept telling both sides that if they tried the case, the $30,000 difference would pale when compared to their legal fees and costs. Eventually, they caught on. After all, it is a matter of *principal*.

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