The Algebra of Mediation

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THE FIRST LAW OF MEDIATION VALUATION

$$M☺ = (\pi☹ = \Delta☹)$$

A successful mediation occurs when the Plaintiff and Defendant agree to settle at an amount that makes them both equally unhappy.

SCHORR'S THEORY OF MEDIATION VALUATION

$$M☺ = \frac{\pi V + \Delta V}{2}$$

A successful mediation will occur either when the parties reasonably evaluate the case at the same amount, or else at an amount that is midway between the Plaintiff's reasonable evaluation of the case and the Defendant's reasonable evaluation of the case.

CALCULATING THE REASONABLE EVALUATION - Fee Shifting case equation.[1]

$$\pi V = W(D + A + i) + L(-A + i)$$

The Plaintiff's reasonable evaluation is the percentage chance of winning times the combined total of damages, attorney's fees/costs and intangibles less the percentage chance of losing times the combined total of attorney's fees/costs and intangibles.

$$\Delta V = W(A + i) + L(D + A + 2A + i)$$

The Defendant's reasonable evaluation is the percentage chance of the Defendant winning times the combined total of *future* attorney fees/costs and intangibles plus the percentage chance of losing times the combined total of damages, Defendant's future attorney's fees/costs, Plaintiff's total attorney's fees/costs and intangibles.

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[1] If the case being evaluated does not have a fee-shifting component, this equation is modified. See Attorney fees/costs in Section 4 below.

There are all variables which the parties may evaluate differently. Successful mediation will depend on the parties convincing each other that their valuation of these variables is unreasonable, thereby bringing

Plaintiff's Reasonable Valuation

In order to have a successful mediation, the Plaintiff must properly evaluate the reasonable value of the case. This requires the calculation of numerous variables which are present in every lawsuit.

1. **W= Percentage chance of winning** -

No case has a 100% chance of success - even with smoking gun evidence. There are possibilities of in limine motions, summary judgment motions, changes in the law, bad juries, bad judges, bad appellate panels, etc. In order to arrive at a reasonable value, these and other possibilities must be seriously considered. Certainly Plaintiff's counsel would not have taken a case, perhaps on contingency, that counsel was not confident of winning. But at the same time, Plaintiffs only win about 60% of discrimination trials. A reasonable percentage to apply for variable W should be between 60% and 85%.

2. **L = Percentage chance of losing**

Once the percentage chance of winning has been calculated, the percentage chance of losing is much easier to calculate. The percentage chance of losing equation is:

L = (100% - W)

As the equation demonstrates, the percentage chance of losing is the converse of the percentage chance of winning.

3. **D = Total Damages**

Total damages can have two components, economic damages and non-economic damages. This equation can be written as **D = E + N**.

E = Economic damages - In most wrongful termination, promotion, demotion, and failure to hire situations, there will be economic damages which are fairly easy to calculate. The equation for economic damages is back pay plus front pay, expressed algebraically as

E = B (%m) + F(%m).

a. Back Pay = For purposes of mediation, back pay should be calculated as the amount of money that the plaintiff would have earned to date with the Defendant, less the amount of money actually earned to date, so long as the plaintiff has reasonably mitigated his/her damages. Gimello v.Agency Rent-a-Car Systems, 250 N.J. Super. 338 (App. Div. 1991) In calculating such earnings it is

reasonable to include fringe benefits such as insurance, pension benefits, car allowances, and overtime/comp. time.

In calculating back pay, interim income earned from collateral sources should not be considered. *See* New Jersey Model Jury Instructions, employment, 2.33 (A)(8). Mitigation, however, can become a very big factor in mediation. The parties should be prepared to address the issue of mitigation at mediation as it is really the only variable in the back pay equation. Hence back pay in the economic damages equation is expressed as back pay multiplied by the percentage in which the plaintiff has mitigated his damages.

b. Front Pay = Front pay is much more speculative than back pay. For purposes of arriving at a reasonable valuable, front pay consists of a future calculation of the difference between what the employee would have earned if not for the termination and what the employee will actually earn - again adding in all fringe benefits. The amount of front is a jury question involving many factors, including discounting for present value calculations. Since front pay is always speculative, for purposes of mediation, no more than two years of front pay should be used in the calculations. This calculation also should be reduced if there is a failure to mitgate.

N = Non-Economic Damages

For purposes of mediation algebra, non-economic damages include emotional distress and punitive damages. The calculation of non-economic damages is much more subjective and therefore much more difficult to assess. In all but the most egregious circumstances, punitive damages should not be part of the reasonable expectation equation. Since less than 1% of cases ever get punitive damages that stick, it is rarely realistic to include punitive damages in assessing the settlement value of your case. Obviously, the threat of punitive damages can be considered as an intangible later in the equation and can always be used as a bargaining chip at mediation.

Emotional distress damages fall into two basic categories (1) documented psychiatric injury involving diagnosis and treatment; and (2) garden variety emotional distress. Obviously, if there is a well-documented psychological injury where the Plaintiff has undergone treatment and medication, as well as a prognosis for future treatment, there can be valuable damages exceeding $100,000.00. If, however, the Plaintiff has not received any psychological treatment or counseling, it is unlikely (but, of course, possible) that the jury will make a large award. Garden variety emotional distress should not be evaluated at more than $50,000.00 for mediation purposes, especially for wrongful termination, demotion, and failure to hire/promote cases.

**Exception for extreme harassment cases* - One exception to the above rule is in cases where extreme harassment has been alleged. The average emotional distress awards in winning sexual harassment trial, for example, is close to $400,000.00. That number includes all cases, including cases where documented psychological injury exists. If there is extreme sexual or racial harassment, it may justify a large calculation for emotional distress damages, even in the absence of psychological treatment

4. **A = PLAINTIFF'S ATTORNEY'S FEES AND COSTS**

In fee-shifting cases, there is no variable that drives settlements more than attorney's fees and costs. One of the main reasons that the parties have arrived at mediation in the first place is due to the parties' desire to save future attorney's fees.

The Plaintiff's Contingent fees

Where the Plaintiff's case has been taken on a contingency basis, the attorney's fees can quickly become a major factor at mediation. If the mediation occurs very early in the litigation process, there are few past attorney's fees and costs. In that situation the Plaintiff's attorney has the best opportunity to earn a fee in excess of the attorney's hourly rate. The longer the parties wait to go to mediation, the greater the chance that the Plaintiff's attorney's fees will exceed the value of the case times the contingency percentage. When the attorney's fees exceed the value of the case, the attorney is then rolling the dice, hoping just to recover the attorney's hourly rate. If the case is lost, the Plaintiff's attorney loses all fees. In addition, the Plaintiff client is not on the hook for attorney's fees, so the client is unconcerned with the attorney's loss or diminution of the standard hourly rate.

It is for all of the above reasons that the attorney's fees and costs utilized to evaluate the case must be reduced to consider the realistic chance that the case will be dismissed pre-trial or will result in a defense verdict. The lower the chances of winning are the higher the chances of losing. Thus, the attorney's fees become a very important in the Plaintiff's reasonable evaluation of the case. For purposes of mediation, of course, the only attorney's fees that can be considered for reasonable evaluation are those attorney's fees already expended. The attorney's fees already expended, however should be enhanced by the lodestar multiplier.

The mathematical formula for calculating Plaintiff's attorneys was set forth by the New Jersey Supreme Court in Rendine v. Pantzer, 141 N.J. 292 (1995). The Court first defined the "Lodestar" formula for determining attorneys fees:

Lodestar = Number of [H]ours reasonably expended x reasonable hourly [R]ate.

Due to the amount of risk associated with litigating a case from the Plaintiff's perspective, the Supreme Court added a contingency multiplier in order to even the playing field. The Rendine Court stated that contingency multipliers should ordinarily range in the 5% to 50% range, with the typical case ranging from 20% to 35%. A contingency multiplier should never exceed 100% and that should only happen in the rarest of circumstances. Rendine at 343. For purposes of evaluating attorney's fees for mediation purposes, a conservative multiplier of no more than 25% should be utilized. Therefore, the algebraic equation for determining attorney's fees to date is:

$A = 1.25(H \times R) + C$

Plaintiff's Future Contingency Fees

In reaching a reasonable valuation of a case, the Plaintiff must always consider the possibility that future attorney's fees and costs will not be recovered. There are numerous scenarios in which fees and costs cannot be recovered, including, but not limited to loss of case, future settlement at a low value, bankruptcy of defendant. Therefore in reducing the value of the case due to the possibility of losing, a deduction needs to be made for the future attorney's fees and costs being put at risk by the continuation of the case.

In the case that is brought to mediation in the early stages, before a lot of attorney's fees have been expended, the present and future attorney's fees will often cancel each other out, but the threat of future attorney fees still looms for the defendant. In calculating any future expense, the time value of money must be considered. This would require a discounting to present value for the future attorney's fees. Courts have resolved this problem by adding the contingency multiplier. When calculating future attorney's fees, instead of discounting future fees to present, instead do not add a multiplier, which will compensate for the present value.

Defendant's Attorney's Fees

From a Defendant's perspective, the attorney's fees are borne entirely by the client, rather than by Defendant's counsel. This creates great pressure upon the Defendant to settle now, if possible, in order to avoid future attorney's fees, as well as the possibility of future Plaintiff's fees being awarded. Conversely, attorney fees already expended are water under the bridge, and do not figure into the Defendant's settlement calculations, except to the extent that the attorney's fees already spent could act as an intangible with the Defendant feeling so invested that it does not want to settle the case on principle.

Because the Defendant does not calculate money already spent for settlement purposes, the Defendant's valuation equation only counts future attorney's fees in their cost of winning calculation. The risk of losing, however, is greatly impacted by the attorney's fees because, if the Defendant loses, it will be liable for all of the Plaintiff's attorney's fees, both past and present, as well as its own attorney's fees.

Practice Tip

Because future attorney's fees play such a significant part in employment mediation, a favorite settlement tool for mediators is to outline for the Defendants to amount of attorney's fees that the Defendants will have to expend in order to get rid of the case. Plaintiff's attorneys are well-advised to prepare, as part of their mediation memo, an estimation of how much more time and expense will need to be expended in order to complete the case. Thus, the Plaintiff will have already supplied and justified the *"A"* variables. Because the Defendant (or insurance carrier), who is paying their attorney's fees are often at the mediation, this exercise is often successful in motivating even stubborn litigants toward settlement in fear of skyrocketing future costs.

Mediating employment cases where there is no fee-shifting

Where fee-shifting is not an element of damages, the equation necessarily changes, and the dynamics change, especially if the case is not a contingency case. In these cases, the settlement equations change, as follows:

$$\pi V = W(D + i - A) + L(-A + i)$$

which simplifies algebraically to:

$$= WD - A + i$$

$$\Delta V = W(A + i) + L(D + A + I)$$

which simplifies algebraically to:

$$= LD + A + i$$

5. **INTANGIBLES**

It is not a coincidence that the variable *"i"* was used to denote intangibles. It is the same variable that is used in mathematics to denote imaginary numbers such as the square root of negative numbers. The intangibles are those factors in the particular lawsuit that cannot be easily quantified. Nevertheless, no settlement equation can be accurate unless the intangibles are considered as an integral part of the calculation. Below is a non-exclusive list of some of the intangibles that need to be considered in evaluating your case.

A. Equitable Remedies

The more important equitable remedies are in the settlement of case, the less relevant the foregoing calculations will be. If the primary purpose of the case is to achieve reinstatement, then the economic damages will have less influence on the resolution of the case. Conversely, very often defendants will be more willing to pay larger settlement value if the employee is willing to agree to retire or resign from the plaintiff's current employment position with the Defendants. Other equitable remedies, such as apologies, disciplinary action against the wrongdoer, and an agreement to institute sensitivity training and stronger employee protection policies can also factor into the settlement value of a case.

B. Venue

The venue of the legal action is an intangible that must be considered by the parties in valuating their case. Cases venued in Federal Court will, on average be more susceptible to summary judgment, have one less step of appeal, and be resolved faster. State Court will generally have more motion practice, no limitation on the amount of depositions that can be taken, and will take longer. If the controversy has yet to be filed or if the matter is in arbitration

rather than court, these factors must also be taken into consideration.

C. Judge

If the parties know who the pre-trial and trial judges are, it can have an impact on the value of the case. A judge's propensities for allowing or disallowing expansive discovery, for granting summary judgment, and trial management can affect the settlement value.

D. Economic status of parties

If the plaintiff is in desperate need of money, the settlement value could fall because the plaintiff will be anxious to settle. If a defendant is in financial trouble it could affect settlement, either to settle quickly to avoid attorney's fees, or perhaps it could hinder settle if the defendant simply cannot afford to pay the settlement. Bankruptcy for either party will have an affect on the parties' ability to settle and therefore the settlement value.

E. Personalities of the parties

Sometimes even the most skilled mediator is unable to convince a particularly arrogant or stubborn litigant that their case is not as strong as they think. Some litigants come into a mediation with a sports mentality, determined that winning is the only important thing. This intangible can scuttle a mediation regardless of the reasonable valuations of the parties.

F. Insurance coverage

Some Employment Practices Liability Insurance (EPLI) policies have very large deductibles. In an early mediation, this can hinder settlement because the insurance company has no liability until the deductible has been used up. The employer has to pay the deductible anyway, and may want to see if litigation can produce a win prior to capitulating. Also, most insurance policies do not cover punitive damages, so where there are egregious allegations, the insurance company may refuse to pay all of the damages, insisting on contribution from the employer.

G. Existence of counter-claims and cross-claims

Sometimes defendants will file counterclaims against the plaintiff, cross-claims against co-defendants, or third-party complaints. The merits and value of the claims must be considered in reaching a valuation on your case.

H. Multiple parties

The existence of multiple plaintiffs or multiple defendants can seriously complicate a mediation and affect settlement value. Unless the parties are on the same page, allies come into a mediation can soon become adversaries, especially if unequal allocations of cost and benefit are discussed.

I. Publicity

Publicity is an intangible that can have a substantial effect on a settlement. Once allegations have been published in the news media, the stakes are raised because reputations are at stake. Part of every settlement negotiation involves the desire of the defendant to keep settlement confidential. This intangible can significant change the value of settlement if the parties cannot agree to confidentiality terms.

J. Mediator

Not all mediators are created equal. Each has their own skill sets, personality, and wealth of experience. Sometimes a mediator who is perfect for one case may not be suited for another. Each mediator has their own process and procedure. It is important to research your mediators. During the initial conference with the mediator you should discuss the mediator's procedures so that you can properly prepare your client and your materials.

K. Who attends mediation

Ideally, the final decision-makers should always attend deposition. Wherever practical, the plaintiff should insist that the final decision-maker for the corporate defendant be present. If the decision-maker is not present, then the corporate representative arrives at mediation with only limited settlement authority. The more phone calls have to made, the more this intangible will affect settlement value.

L. Preparation of the parties

An unprepared attorney can have a detrimental affect on the client's case at mediation. On the other hand, a well-prepared mediation memo is essential, both in the education of the mediation as well as controlling the negotiating points. Economic damages, which are easily calculable should be completely prepared with documentation. Surveys of jury verdicts in similar cases can also have an intangible affect on the value of a case at mediation.

CONCLUSION

Getting a case settled at mediation is win-win situation for all parties. With proper preparation and use of the mathematical equations provided herein, the parties can arrive at mediation with a reasonable evaluation of their respective case and a clear idea of where the case should settle.

Key to Variables

π = Plaintiff

Δ = Defendant

M = Mediator

V = Reasonable valuation
D - Total damages
E = Economic damages
N = Non-economic damages
A = Attorney's Fees and costs
A = Future Attorney's Fees
i = Intangibles
%W = Percentage chance of winning
%L = Percentage chance of losing
m = mitigation
B = Back pay
F = Front pay
H = Hours of Attorney's time
R = Reasonable Hourly rate
C =Costs expended