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The problem with Mediator Settlement Proposals



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During the course of a mediation, the parties might invite the mediator to suggest a settlement figure, or alternatively, the mediator might decide to throw out a number (with or without asking for counsel's agreement). Mediator proposals are tempting, as they can be useful in getting past a roadblock. However, they have to be used with great care and, in my opinion, only when counsel agree to this approach.

For mediation to be effective, the parties and their lawyers have to develop a certain level of trust and rapport with the mediator. Even more importantly, counsel must know that their bargaining position after a failed mediation will not be prejudiced by the mediation process.

Once the mediator makes a settlement proposal, the mediation is effectively terminated unless the settlement proposal (or something very close to it) is accepted. The party who feels the figure is unfair will lose confidence in both the mediator and the process. The party who believes the mediator's proposal is reasonable feels emboldened, and may be unlikely to accept a different number. And yet, a mediator in making a proposal is not

necessarily picking a number which reflects his or her views of the merits of the case. While an assessment of the merits goes into the pot, more often the figure selected is what the mediator *thinks* the case should settle at, having regard to the exchange of offers which has already taken place. A client who has come to the mediation and demonstrated a true spirit of compromise – prior to the mediator tabling the proposal – is likely to get the short end of the stick.

A truly merit-based mediator's proposal is likewise fraught with risk. For example, if the mediator believes a case is worth \$100,000, and the defendant has already offered \$120,000, how can the mediator seriously table the lower figure? And does the mediator really know the facts and the law well enough to venture more than a stab at the right number?

Unfortunately, while lawyers may understand that a mediator's proposal is usually the mediator's "Hail Mary" effort to resolve the dispute, the clients cannot help but think that the proposal reflects the mediator's view of the relative strength of the parties' positions. If the proposal is not accepted, it is very possible that one of the clients will become further entrenched following the mediation, to the detriment of the settlement process.

All of this said, a mediator proposal can be useful as a last resort, in the following circumstances:

- (a) The parties through the process of negotiation have come to the point where they are not that far apart. Mediations often breakdown at this point because one (if not both) of the clients feel they have already compromised enough, and simply can't bring themselves to make that one last move that will settle the case.
- (b) The proposal should be made on a "double blind" basis. The mediator will separately provide each party with the settlement number. Each side will reflect on the number and advise the mediator, privately, whether it is agreeable or not. If both sides agree, there is a settlement; if one party rejects the proposal, he or she will never know whether the other side accepted it.

Finally, mediation should never become a substitute for negotiation. It is only through vigorously testing the other side's receptivity to your position, that you can be reasonably confident that you actually achieved the best deal for your client.

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