

The Mediator's Proposal As A Tool For Litigants

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The end of the mediation day is near. There has been no success in negotiating a resolution. Everyone is frustrated and the mediator is ready to declare an impasse. Should a mediator — the legal neutral to the dispute — try to resolve the case by issuing a nonbinding proposal based upon a dollar amount that he feels could be accepted by the parties? With more frequency, the answer that the mediator, counsel and the parties have reached is a resounding “yes.” Mediators' proposals, which call for an unconditional and confidential acceptance or rejection, are resolving high-value disputes on a regular basis. Why is this occurring and what are the tactical implications for litigants in anticipating that a mediator's proposal could resolve litigation?



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The Mechanics

A “mediator's proposal” comes about in the waning hours of a lengthy mediation. The parties have been showing movement and adjusting their settlement figures, yet an agreement cannot be reached. The traditional “bracketing” tactic (“if party A goes to X then party B will go to Y”) has not succeeded. At that point, the parties and counsel agree to the concept that the mediator should issue a settlement figure based upon the discussions that occurred with the parties throughout the mediation.

A “mediator's proposal” can be initiated by the mediator, or requested by one of the parties. The proposal is one that the mediator believes could possibly be accepted and would “stretch” the parties to move in a negotiated fashion. The proposal is not the mediator's “ruling,” or viewpoint of what is “fair,” but it is a number that could appeal to the parties. Once the mediator makes the proposal, the parties will (1) vote yes/no without modifications or counter-proposals; and (2) respond in a confidential manner with votes never being disclosed if the verdict lacks unanimity. At the end of whatever time period is agreed upon for acceptance or rejection of the proposal, the mediator will simply announce “settlement” or “impasse.”

The Mediator's Proposal Works Because it's Perceived as an Equitable Ruling

The mediator's proposal works to settle a case because it is perceived by the parties and counsel in a manner different than how it is characterized. The mediator is a neutral, and the role of a mediator is not a decision-maker. The mediator's proposal is not labeled as a ruling, a judgment or the mediator's opinion as to what is equitable. Nonetheless, if the parties and counsel respect the mediator and the

process that the mediator has followed throughout the negotiations, the mediator's proposal will be perceived as a "fair result," and it will be difficult for the parties to reject the number reached by the mediator, especially after a long day of negotiations, where the alternative is the declaration of an impasse. Thus, the success of a mediator's proposal is dependent upon the mediator demonstrating to the parties during the time frame leading up to the proposal that the mediator understands the dispute, the parties' positions and has tried in good faith to resolve the dispute before issuing the proposal.

A good mediator in a high-value dispute understands the conflict, and will have studied the facts and legal underpinning of the controversy prior to the actual mediation conference. The mediator is cognizant of the procedural posture of the case and the rationale for the parties and counsel having decided to move forward with mediation. Normally, the mediator will have chatted confidentially with each side and assessed the demeanor and concerns of the litigants prior to the mediation. The mediator has probed counsel with the "hard questions" that they are facing in the litigation and the risks of continuing the dispute.

Once the mediation begins, the mediator listens to the "best-case scenario" from the parties, usually in both a conference room where all parties are present and in private caucuses. A good mediator has demonstrated to everyone involved that he "hears them" and understands the rationale for the positions.

Further, the mediator has persevered throughout the day to try and bridge the gap. The mediator has used all the tactics in the arsenal to reach a settlement. If the mediator has done a good job, the parties and counsel are aware of the possible outcomes and the financial and psychological costs associated with pursuing the case to trial. Nonetheless, there is still a gap in reaching agreement.

At this stage of the mediation, if the neutral mediator has successfully gained credibility with the parties and counsel, a "proposal" is difficult to turn down. The parties will have a difficult time reporting to other responsible decision-makers at their companies that the number proposed by the mediator — somewhere higher than what the defendant "wants" to pay and somewhat lower than what the plaintiff "wants" to accept — is not a fair result. A mediator's proposal allows the party representatives to essentially "blame it on the mediator." Although not a ruling, a good mediator's proposal that is viewed as fair and equitable will be hard to turn down. Litigants who contemplate rejecting a mediator's proposal will have to face the possible risk of a verdict that is less favorable to settlement, especially in high-value business litigation that involves a potential reputational risk, a substantial time commitment, and costly legal fees.

The Mediator's Proposal as a Tool of the Litigant

Generally, mediation should be viewed as a tool of litigants in the litigation process. It is accepted that filing a motion to dismiss, a summary judgment or noting an important deposition is a strategic tactic; mediation should also be viewed in a tactical manner. Mediation occurs at different stages of the litigation and for different reasons. Sometimes mediation is scheduled for the purpose of convincing your client that the dispute is impossible to resolve at the juncture of the case. Many times, mediation occurs toward the end of the litigation process when the parties are all convinced that a negotiated settlement facilitated by a neutral is preferable to continued litigation.

The mediator's proposal should be viewed as a tool of the litigant in mediation and not just a tool of the mediator. Setting the stage for a mediator's proposal can be a powerful strategic move to resolve a high-value business dispute. While a mediator must establish credibility before issuing a proposal, the

same obligation is required of the parties. In order to convince a mediator to issue a proposal, the parties and counsel should have avoided taking extreme positions, made responsible offers, and cogently explained their decisions. If all parties at the mediation have proceeded in this manner, and the mediator has achieved the respect of the parties, then a litigant can bridge a negotiating gap by (1) convincing the mediator to issue a proposal; and (2) persuading his or her adversary to accept the concept of a mediator's proposal. At the end of the day, the view of a respected neutral will be difficult to reject.

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