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Speakers:
Hon. Russell Wojtenko, Jr., Director and Chief Judge of Compensation
New Jersey Division of Labor and Workforce Development
Dr. Natacha Falcon
North American Spine and Pain, Toms River
Theodore Smyk, Structured Settlement Consultant
Arcadia Settlements Group
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A Mediator's Proposal – Whether, When and How It Should Be Used

By Stephen A. Hochman, Esq.

As most mediators know, a mediator's proposal is a settlement proposal that the mediator makes to all parties, and each party is requested to accept or reject it, on the exact terms proposed, in a confidential communication to the mediator. It calls for either an unconditional "yes" or "no" response, without modification, and the mediator is not permitted to disclose the responses that he or she receives unless both responses are "yes." Thus, if one party says "yes" and the other party says "no," the one who said "yes" will not be prejudiced if settlement negotiations (or subsequent mediations) occur at a later stage of the litigation.

In this article I will assume that the dispute that is the subject of the mediation is *ostensibly* a money dispute that is either in litigation or, if not settled in the mediation, would proceed to litigation (or arbitration), and that all parties are represented by counsel. The reason I say that the dispute is *ostensibly* about money is that, in almost all cases, including the money cases, there is an emotional component. That is why, as noted below, it is important for the mediator to permit the parties to vent their feelings (usually anger at their adversary), and for the mediator to validate those feelings, whether or not the mediator considers those feelings rational, before beginning the risk analysis and reality testing phase of the mediation. For simplicity, I will assume that there are only two parties and one dispute (which could involve more than one issue), but a mediator's proposal can also work when there are multiple parties and multiple disputes.

When Should a Mediator's Proposal Be Used?

A mediator's proposal should be used only as an "end-game," *i.e.*, only after all other attempts to avoid impasse have failed. Before considering the use of a mediator's proposal, the mediator should first avoid making what I consider the ten mistakes that even good mediators may make. My list of those 10 mistakes is:

1. Failing to get the right persons at the table.
2. Failing to explain the mediator's role as "agent of reality."
3. Permitting settlement negotiations to begin prematurely – *i.e.*,
 - a. prior to permitting the parties to vent; and
 - b. prior to risk analysis and reality testing.
4. Failing to orchestrate the negotiations:
 - a. by discouraging "out of the ballpark" offers or demands; and
 - b. by discouraging moves that send the wrong signal.
5. Failing to recognize that unrealistic expectations must be lowered gradually.
6. Being evaluative (a) too early or (b) in a joint session.
7. Failing to suggest ways to avoid reactive devaluation of sensible settlement proposals from the adversary.
8. Believing "bottom line" offers or demands.
9. Failing to "test the waters" before making a mediator's proposal.
10. Being impatient or failing to be persistent or giving up prematurely.

Although a full discussion of these 10 mistakes is beyond the scope of this article, some of these mistakes will be referred to below.

It is important to emphasize that every other possible impasse breaking technique should be used by the mediator before resorting to a mediator's proposal, including attempting to

narrow the gap by using the conditional offer technique. For example, by asking the defendant in caucus, “If I could convince the plaintiff to reduce its demand to \$X, would you be willing to increase your offer to \$Y?” Conversely, in a caucus with plaintiff, you can ask “If I could convince the defendant to come up to \$Y, would you be willing to come down to \$X?” Even if the mediator knows from a confidential caucus communication that a party is willing to come down to \$X or up to \$Y, an offer that a party perceives that its adversary needs to be convinced to make may have a greater psychic value to the other party than if that offer was freely given by the adversary.

The longer the negotiation process continues, the easier it becomes to close the gap and help the parties reach agreement without the need to resort to a mediator’s proposal. That is because the more time that the parties have invested in the mediation process, the more they are motivated to have it succeed rather than fail. In cases where the definitive settlement agreement is likely to have contentious issues (*e.g.*, provisions relating to confidentiality, non-competition and non-disparagement, and provisions for liquidated damage or other remedies if those provisions are breached), it may make sense to suggest that the parties first try to agree on the terms of the definitive settlement agreement, leaving the dollar amount blank for later negotiation. Once the parties have agreed on the terms of the definitive settlement agreement, the likelihood of reaching agreement on the dollars increases because the parties are more motivated to avoid a failed mediation in which they have already invested the time to agree on the non-monetary issues.

When Should a Mediator’s Proposal Not Be Used?

My preference is to suggest the idea of a mediator's proposal and wait to see if either party objects rather than first asking permission from the parties to let me make a mediator's proposal. That is because I am less likely to get an objection if I first state my belief that a mediator's proposal is likely to overcome the impasse and avoid a failed mediation. However, some mediators believe it would not be appropriate to make a mediator's proposal if either party objects after the mediator suggests the making of a mediator's proposal. Because either party is free to reject the mediator's proposal, I do not believe that either party should have a right to veto the mediator's use of a mediator's proposal as a last resort to avoid a failed mediation. However, if one party requests the mediator to defer making a mediator's proposal because it believes that further negotiations might succeed without it, that request should be honored.

What Are the Possible Disadvantages of Making a Mediator's Proposal?

The main reason that many mediators oppose the use of a mediator's proposal is their argument that, if a mediator gets a reputation of using a mediator's proposal as an impasse breaking technique, the parties are likely to spin the mediator by posturing and taking unrealistic positions in order to create an impasse rather than being candid with the mediator and negotiating in good faith by admitting their weaknesses. However, in my experience the parties rarely admit to me the weaknesses in their case. Instead, they do their best to convince me that they have a winning case in the hope that I will make their arguments when caucusing with their adversary and lean in their direction if and when I make a mediator's proposal.

Another reason that some oppose the use of a mediator's proposal is their belief that it is directive rather than merely evaluative and thus inconsistent with the principle of party autonomy --, *i.e.*, that the each party should make its own decision free from the influence of the

mediator. However, I believe that most parties want the mediator to help them be realistic about their litigation alternative and hope that a mediator's proposal will influence their adversary's decision towards settlement at least as much as it may influence their own decision. The reality is that, by making a mediator's proposal, the mediator is not interfering with the unfettered right of the parties to make their own independent decision to choose between what I call the "lesser of the two evils" – *i.e.*, a less than ideal settlement compared to the uncertain and expensive litigation alternative.

Another objection that some have expressed is that the mediator's proposal may create the appearance that the mediator is not impartial because one or both parties may perceive that the proposal is more favorable to its adversary interests than its own interests. However, that misperception can be overcome by the mediator making it clear that the proposal represents his or her independent and objective evaluation of the dispute and best effort to recommend a settlement that is better for both parties than the litigation alternative.

Whether or not the parties anticipate that I will, if necessary, make a mediator's proposal to avoid a failed mediation, they rarely tell me their weaknesses because they want me to focus on the strengths of their case when I caucus with the other party. Nor do they tell me what they consider to be their bottom line or worst case settlement alternative to litigation. Whenever parties tell me their bottom line, I thank them for sharing with me their present thinking. Most attorneys experienced in mediation advocacy will spin the mediator to some degree because they are hoping to get a better result for their client than a worst case settlement. However, the most experienced attorneys will avoid insulting the mediator by claiming to have a bottom line that is totally out of the ballpark of reality. As discussed below, in deciding on the terms of a

mediator's proposal I avoid being influenced by what the parties tell me is their bottom line in our private caucuses.

How Should the Mediator Prepare the Parties For a Mediator's Proposal?

Before making a mediator's proposal, it is important that the mediator explain that part of the mediator's job is to play the role of "agent of reality" and thus avoid making mistake number 2 in the above list of ten mistakes. It is important for the parties to understand that, in the mediator's confidential caucus with each party, part of the mediator's job is to focus them on their weaknesses rather than their strengths, and that does not mean that the mediator is favoring their adversary. I repeatedly remind the side that I am caucusing with that, when I caucus with their adversary, I will similarly be playing the devil's advocate role with them.

In my introduction to the mediation I usually explain to the parties that I am the only person in the room with no stake in the outcome. To emphasize my impartiality, I make it clear that I have no interest in whether the case settles on the high end, the middle or the low end of the range of possible settlements, and my only agenda is to help the parties settle on terms that both parties decide is better than their litigation alternative. It has been clinically proven that those with a stake in the outcome, including the attorney/advocates, cannot be totally objective in evaluating their likely litigation outcome. Because the lawyers are hired to focus their efforts on supporting the strengths of their client's case, they tend to underweight the weaknesses in their case and often fall in love with their most creative arguments. It is not uncommon for the lawyers to have "advocacy bias" that anchors them to their initial evaluations and to devalue and reject what they hear from their adversary. However, they are more likely to at least listen to and objectively evaluate what the mediator says.

What Criteria Should the Mediator Use in Formulating a Mediator's Proposal?

Most mediators try to choose a number for their mediator's proposal that they believe has a chance of being accepted by both parties without taking into account what the mediator believes is the value of the case. I submit that the mediator should endeavor to select a number that, in addition to having a chance of being accepted by both parties, is in the win-win range based on the mediator's objective analysis of the value of the case. An example of the win-win range is, if the mediator believes plaintiff has a 50-50 likelihood of winning \$1 million and the parties will each spend \$100,000 to get a court to give them an all-or-nothing decision, the win-win range is \$400,000 to \$600,000. It is not unusual for both parties in a 50-50 case to come to the mediation believing that they are at least 70-75% likely to win. Of course, they cannot both be right. That is why it is important for the mediator to avoid making mistake number 3.b. in the above list of ten mistakes by being sure to do risk analysis and reality testing before permitting the parties to begin negotiating numbers.

I believe that the dollar number that the mediator proposes should be based on the mediator's independent judgment as to the value of the case based on an objective decision tree analysis and not on the midpoint between what the parties claimed to be their respective bottom lines. Ideally, the mediator should propose a number in the middle of what s/he believes is the win-win range (*e.g.*, \$500,000 in the above example). I would not be comfortable in the above example of proposing a number below \$400,000 or above \$600,000 merely because I thought it might be accepted by both parties. The issue is not what the mediator believes is fair (a totally subjective standard), but what the mediator objectively believes is better for both parties than their litigation alternative.

I never believe bottom lines that are outside of the objective win-win range. Of course, even if both parties in the above example honestly believe they are more than 60% likely to win despite the risk analysis and the reality testing that they heard from the mediator in caucus, they may still accept a \$500,000 mediator's proposal based on their non-monetary interests and needs, including the need to avoid risk and put the dispute behind them.

Before revealing the dollar number of the mediator's proposal, it is important for the mediator to avoid making mistake number 9 in the above list of ten mistakes, which is failing to "test the waters" in caucuses with each party before revealing the dollar number of the mediator's proposal. For example, if the mediator tells the plaintiff in the above example that she is considering a number in the range of \$450,000 to \$500,000, the mediator can gauge the plaintiff's reaction. Similarly, the mediator can gauge the defendant's reaction to a number in the range of \$500,000 to \$550,000. If plaintiff rejects the \$450,000 out of hand more strongly than the \$500,000, and the defendant similarly rejects the \$550,000 more strongly than \$500,000, the mediator can feel that there is a good chance that both parties will accept a \$500,000 mediator's proposal.

Often a party will agree to the dollar number in a mediator's proposal even though it would never have agreed to the same number if it were an ultimatum by its adversary. Because the number is the mediator's number and not the adversary's, it eliminates reactive devaluation. It often boils down to the parties choosing between the lesser of the two evils – either a less than ideal settlement or an uncertain and costly litigation.

What Are the Advantages of a Mediator's Proposal?

The most important advantage is that a mediator's proposal can overcome the posturing that often goes on in negotiations. Of course, there is a number below which the plaintiff would be rational in refusing to accept in a settlement, and there is a number above which the defendant would be rational in refusing to pay. However, the parties rarely offer to settle for that worst case number and prefer to shoot for a better number. The beauty of using the mediator's proposal as a last resort is that, from the plaintiff's perspective, the money is "on the table," at least conditionally, and both parties may accept it, albeit reluctantly, even if it is slightly worse than what they considered their worst case number during the negotiation process. Also, the fact that the parties know that the mediator will not choose a number that is outside of the objectively determined win-win range will often increase the likelihood that it will be accepted by both parties. That is because it comes with a stamp of objectivity and legitimacy, assuming the parties respect the competence and integrity of the mediator.

Is There Anything a Mediator Can Do If Only One Party Accepts the Mediator's Proposal?

On the rare occasion that only one party accepts my mediator's proposal, I might ask the accepting party if it would be willing to release me from the pledge of confidentiality and let me tell the rejecting party that the accepting party would be willing to make a slight improvement in my mediator's proposal in the interest of avoiding a failed mediation. In a case where the defendant gave me permission to make a second mediator's proposal if it was no more than 10% above my mediator's proposal, the plaintiff agreed to accept that slightly increased number. That was because it met the emotional need of the plaintiff to feel that it squeezed the proverbial "last nickel" out of the defendant, who the plaintiff felt had treated him unfairly. Even in cases that

are ostensibly only about money, I have found that the percentage of those cases that have an emotional component is, “give or take, 100%.”

How Should The Parties Be Instructed to Respond to a Mediator’s Proposal?

I always prefer to get the answers to my mediator’s proposal from both parties at the same time, and I usually ask each party how much time it thinks it will need to decide on their answer. By getting answers at the same time (*e.g.*, by asking each party to send me a one word “yes” or “no” email between Noon and 5:00 PM on the agreed date), it avoids the situation where I am reluctant to continue my attempt to explain to the more unrealistic party why I believe my proposal is better than its litigation alternative. If that unrealistic party finds out or suspects that I previously received an answer from its adversary (who I believe is more likely to accept my proposal), continuing my attempts to do reality testing with the unrealistic party could compromise the confidentiality that I promised to both parties that I would not disclose the answers to my proposal (either by words or actions) unless both parties responded with a “yes.”

Attached as an Appendix is an example of instructions that I sent to counsel for both parties explaining the procedure for replying to my mediator’s proposal in a case that I knew would be difficult for the plaintiffs to accept because of the unrealistic expectations they had as to the value of their case. It was a case that I spent many hours with the parties helping them reach agreement on the wording of a complicated definitive settlement agreement, and I knew I would have much difficulty in helping the plaintiffs realize that the dollar number of my proposal was preferable for them than their litigation alternative. Fortunately, plaintiffs’ attorney realized that my mediator’s proposal was clearly better for his clients than their litigation alternative, but he needed my help in convincing his clients to overcome their anger at the

defendant and avoid what would most likely be a worse result for them if the case went to litigation. Because I expected that it would take much time for me and plaintiffs' counsel to convince all three plaintiffs to accept my proposal, I instructed the parties to each let me know when they were ready to give a "yes" or "no" answer, but to refrain from telling me what that answer was until I was told that both sides were ready to give their answers. That way I could continue to help plaintiffs' counsel convince his clients to accept the proposal as being preferable to the litigation alternative without causing plaintiffs to suspect that the defendants had previously accepted the proposal.

Conclusion

I believe that the mediator's proposal is an effective end-game to break impasse for those mediators who are willing to be evaluative when necessary to avoid impasse. I find it almost always works. To give up without attempting to use the mediator's proposal as a last resort is, in my opinion, a missed opportunity, assuming that the parties hired the mediator to help them settle their dispute on terms that they ultimately decide are better than their litigation alternative.

APPENDIX

Re: Instructions for Replying to My Mediator's Proposal

Dear _____ and _____,

Now that you both know that \$ _____ is the dollar amount that I propose be inserted in the previously agreed final draft of the Settlement Agreement, I want to explain the procedure for communicating to me, in confidence, your clients' "yes" or "no" response to my mediator's proposal.

I realize that neither of your clients will be happy with the number I proposed. One definition of a good settlement is when both sides are equally unhappy. Particularly because I know that both sides will be unhappy with my proposal, it is important that neither side make a hasty decision as to whether to accept or reject it.

In order to give both sides ample time to make a rational business decision, I am requesting each of you to let me know **when** your client has reached a decision, without telling me at that time **what** that decision is. Once I hear that both sides have made a decision, I will then ask each of you to simultaneously send me a confidential email in which you indicate your client's decision, which must be either an unconditional "yes" or "no." The reason that I do not want to know the answer from either side prior to knowing the answer from the other side is to give me an opportunity to do some additional risk analysis with one side without that side believing that I would not be doing that risk analysis if the other side had not previously said "yes." Getting simultaneous responses will enable the side that says "yes" to be sure that, if the other side says "no," the party that said "no" will not know whether the other side said "yes" or "no." That way, if we don't end up with a settlement that is acceptable to both parties, the party that said "yes" will not be prejudiced in any possible future settlement negotiations.

As I previously explained, the mediator's proposal is an "end-game" which a mediator should use only after all other efforts to settle have failed and the parties have reached an unbreakable impasse in the negotiation process. It is a last resort effort to see if we can salvage what would otherwise be a failed mediation. Although it is a non-negotiable "take it or leave it" settlement proposal, it represents what I believe should be better for both parties after factoring in the risks, uncertainty and costs of the litigation, including the intangible costs. In the over 350 cases that I previously mediated, there were only seven in which I did not get two yeses to my mediator's proposal. In six of those cases I got one "yes" and one "no," and in all of those six cases the side that said "no" ended up with a worse litigation or arbitration result than it would have had if it had accepted my proposal. My hope is that we can avoid that happening in this case so that neither side will end up having "non-settlor's remorse."

Please feel free to contact me at any time with any questions, and I hope to be having conference calls with you and your clients in the near future.

Sincerely,

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