

The Whys and Hows of a Mediator's Proposal

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It is a common refrain in mediations, “how about making a mediator’s proposal?” The answer frequently is “not yet” or “that’s not what I want to do.” What are the details behind the concept of a “mediator’s proposal” and when is it appropriate to be offered by the mediator and accepted by the parties?

Mediation is a voluntary process where the parties try to resolve their differences without litigation or arbitration and frequently with the assistance of a neutral, a mediator. It generally is not adjudicative but requires the mutual assent by the parties to resolve their dispute. The mediator serves a very different role than a judge or arbitrator. The mediator tries to be a facilitator to get the parties to an agreement. To be effective, the mediator must be well versed in the dispute and the parties’ respective contentions. The mediator employs the tools of reasoning, challenging, suggesting and cajoling, often playing “devil’s advocate” regarding weaknesses and strengths in the various positions.

An important part of the mediator’s role is that she or he is not an advocate and does not hold a dispositive view about the dispute. As a neutral I often say during a mediation, “I have no stake in who wins or loses and no view of the

ultimate merits. All I care about is helping the parties reach an agreement.”

Of course, as time goes on the parties may approach an impasse, despite the best efforts of the neutral. When impasse occurs, mediators sometimes will offer to make a “mediator’s proposal,” or the parties may request one. A mediator’s proposal consists of a specific formula to settle the dispute. For example, the proposal might be: “party A will pay \$5 million to party B in full settlement of the dispute, despite party B’s demand for \$15 million and party A’s position that it is willing to pay \$300,000.” The essence of the proposal is that it is non-negotiable; the proposal either is accepted by both sides or fails. Generally, the mediator will tell each party to respond privately whether it accepts the proposal. This procedure assures that if the proposal does not succeed the party willing to accept will not be disadvantaged with the other side knowing of its willingness to compromise on the terms of the proposal.



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Can there be a mediator's proposal when there are three or more parties in the process? Obviously, the more parties, the more complicated for a mediator to make a settlement proposal. For example, if the mediation includes an insurance company which does not necessarily have the same position as its insured, the mediator must determine whether it is likely that a proposal acceptable to the insured will find favor with the insurer. As noted earlier, a prerequisite to a mediator's proposal is that all sides agree to the process. With multiple parties, the mediator may find that this initial buy-in is a stumbling block.

Similarly, if there are noneconomic factors, e.g., an injunction request or a job recommendation for a dismissed employee, the prospect of a successful mediator's proposal is more daunting, but not impossible. Presumably, the experienced mediator will make the judgment whether to suggest a proposal based upon earlier discussions with each side and an assessment whether there is any flexibility on the non-economic matters, or whether the non-economic issues can be overcome by monetary terms.

When the mediator's proposal works, the process has achieved success and results in a settlement. However, if it is not accepted by one or both sides, the mediation process likely is at an end. The parties now know how the mediator evaluates the dispute, and which side's position appears to be shared by or favored by the mediator. Hence, when the mediator's proposal has failed, it generally means the end of the mediation effort, at least with this specific mediator.

There are several takeaways from this description of a "mediator's proposal."

First, it should not be offered nor requested until the parties genuinely have exhausted their

negotiations and truly are at an impasse. Often a party may say "I cannot move any further," when in fact with pushing and reasoning the mediator may be able to advance the process. Sometimes a "time out," i.e., an adjourning of the mediation for a few days, may refresh the parties' efforts to resolve the dispute without a proposal from the mediator. Unfortunately, the premature use of a mediator's proposal is more likely to end in failure than in success.

Second, the mediator's proposal should not be employed if the gulf between the parties is too great. Sometimes, parties need to engage in litigation for a while before they are truly interested in settling the dispute out of court or before their litigation objectives may change. In such situations, the mediator's proposal is a wasted effort since the parties are too far apart to realistically resolve their dispute. Here, the mediator's experience and judgment come into play in deciding whether a proposal will be useful or counterproductive. The proposal may upset one side and make it feel that its position is not receiving adequate attention or respect. An attempt to push the parties to a settlement in such circumstances may worsen the relationship between the parties and make an ultimate resolution all the more difficult.

Third, whether a party should accept the mediator's proposal requires careful thought and analysis. If the mediation has gone on for a while, presumably the proposal reflects the mediator's considered judgment of where the dispute should settle. This may be what the mediator considers to be a "fair" result, but more importantly it is often a practical and realistic assessment. It also reflects the mediator's assessment of the strengths and weaknesses

of the respective parties' positions. This should weigh heavily with each party as it evaluates what to do. Likewise, each party must recognize that if they do not accept the proposal, the mediation will be at an end and they will be forced to resume litigation efforts with all its attendant costs, burdens of time and distractions. At the same time, the fact that the mediation effort could not succeed without the mediator's proposal may itself be an indication of the confidence with which one or both parties have in its or their respective positions. Occasionally, a party may worry that despite the confidentiality of the process the mediator may have an "informal" discussion with the Judge handling the case if there is no agreement. In any situation where a report is made to the Judge about an unsuccessful mediation, it should only be that the effort failed. Absent an agreement beforehand, or as a part of a court order regarding the mediation, there should be no discussion with the court about details or assigning blame to one side or the other. A party should not hesitate to reject the proposal if it truly believes that the offered settlement is not consistent with its ultimate litigation objectives or likelihood of success.

Fourth, can the mediation continue if the proposal is not accepted by both sides? It is unlikely that the process can continue with this mediator. Given the parties' recognition of the mediator's views implicit in the proposal, it would only make sense to continue if the mediator and the parties believe that they still can reach a settlement and that the process is workable without enlisting a

new neutral. Of course, if that were the case then the mediator's proposal likely was premature!

Fifth, the rejection of the mediator's proposal does not mean that a future mediation will be unsuccessful. As noted, sometimes one or both parties feel the need to litigate further before a resolution is appropriate and workable. The fact that the mediation effort did not result in a settlement at this point does not mean that the process should be eschewed in the future after litigation has continued, perhaps with the same or a different mediator. Frequently, developments in the litigation process, such as a decision on a motion to dismiss or information gleaned in discovery, will revive the effort to resolve the dispute informally and the mediation process can ultimately help the parties achieve a settlement.

In sum, the timely use of a mediator's proposal by a skilled neutral can help the parties reach a satisfactory settlement. Often such a resolution is one where both sides are disappointed but happy to have the dispute behind them. The challenge for the neutral is to determine whether such a proposal will likely succeed and, if not, to decline to make one.

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