Daily Journal
VERDICTS & SETTLEMENTS
FRIDAY, MARCH 19, 2021

Mediator's proposals: value and unintended consequences

By Greg Derin

"We are at an impasse! We will move no further."How often have parties uttered those words, often out of impatience, fear or for strategic reasons. Whenever parties seem to find themselves in this situation, I am reminded of the wisdom of that master mediator Yogi Berra: "When you come to a fork in the road, take it."

In 20 years mediating commercial and employment cases, I have rarely seen a genuine impasse. Nearly all mediated matters settle, if not at the initial session, then with appropriate follow-up, or after necessary litigation steps reveal the value which was not evident during the initial mediation session. Parties and counsel often need a fresh perspective after a grinding day of negotiation, or time to reflect or a reason to change their thinking.

Increasingly, I find parties relying on the mediator to make a "mediator's proposal" to overcome their perceived or created "impasse." In part, this trend derives from a growing reliance on mediators to evaluate the merits of the parties' positions and opine on prospective outcomes. Most litigators agree that the best mediators have an expansive "toolbox," initially helping the parties explore mutual gains, later turning more evaluative as the negotiation narrows and becomes a more zero- sum proposition.

Compromise is more painful as the gap between the positions of the parties narrows. This is where skilled mediators bring their greatest value and where reputations as closers is earned. A mediator's proposal should be but one tool in a deep toolbox. If a mediator develops a reputation for relying on proposals constantly, counsel will bargain all day to place themselves in the most advantageous position for the inevitable proposal.

A mediator's proposal should be but one tool in a deep toolbox. If a mediator develops a reputation for relying on proposals constantly, counsel will bargain all day to place themselves in the most advantageous position for the inevitable proposal.

When appropriate, a mediator's proposal can be deployed to great effect. They are rarely an evaluation of the projected litigated outcome of a case. Rather they are an assessment, after hours of intense bargaining between the parties, of the mediator's view of where the parties might stretch to accommodate a settlement. In the hands of an experienced mediator, they do reflect the parties' bargaining in light of significant facilitated risk-benefit analysis. The proposal should include financial terms in a range which include the zones of possible agreement which the parties have signaled but have been unable to close around. In this sense, the mediator's view of where settlement can be achieved generally embrace territory which is within the grasp of both parties.

The proposal is "double-blind" in that neither side knows if the other accepted unless both sides unconditionally assent. As the parties have bargained throughout the day, the issues will have narrowed and, hopefully, there will be momentum toward agreement on some issues (e.g., confidentiality, non-disparagement, liquidated damages). In addition, experience should guide the mediator in formulating a proposal on the remaining open issues he believes the parties will accept. Some mediators even preview financial terms or ranges to test them before making a formal proposal.

Why make a mediator's proposals? In 20 years, I have done less than a dozen mediator's proposals. If a party tells me they are at "impasse," the term should mean they are not willing to move further. If I then ask them if they are willing to hear a mediator's proposal, not to embarrass anyone, it actually means they are willing to hear another proposal and are willing to settle for something more or less than their current position. So ... let's keep dancing. If parties are not too stubborn or tired, and if agreement is possible, they usually keep negotiating and reach agreement on the strength of the parties' judgment and determination.

Are there exceptions? Of course. In a mediation a number of years ago, the sole corporate representative in an employment mediation refused to offer more than $100,000 to settle a case with significantly greater potential liability. As we were making no progress, I suggested that I make a mediator's proposal to force my assessment of where I believed that the case could settle to reach the eyes of a higher corporate representative, and perhaps, insurers. It was a struggle to get the representative present to agree to receive my proposal, but I was ultimately successful. I prepared a two-page proposal, which included my assessment of the issues and potential liability and provided a week for the parties to respond. My proposal for settlement included payment of several million dollars to the plaintiff — a bold suggestion given the lack of progress during the mediation. Both parties accepted.

In another exception, it became evident that the corporate representative agreed with my assessment of the required settlement value of the case, but the amount exceeded his authority. My assessment, stated in a mediator's proposal, assisted

him in securing additional authority from reluctant superiors. Proposals are often helpful not only for corporate "cover," but to help others who find comfort in sharing with their confidential decision-making circle what the mediator has suggested as a fair resolution.

Proposals are also helpful to assist attorneys in counseling clients to make a final move. Of course, client self-determination is paramount. However, parties carry meaningful baggage throughout litigation, not the least of which are cognitive biases which impair the clarity of their decision-making. A mediator should never discount a legitimate plea for help from a party or counsel.

Because I use mediator's proposals sparingly, and craft them carefully, I do not recall ever having one declined. I have heard from mediators who feel frustrated because they feel the parties were simply positioning themselves to influence and anticipated mediator's proposal (e.g., to have him or her split the difference between impasse numbers). Anticipating a proposal, parties might be less than candid about their other interests, foreclosing options for creative solutions. Constrained by views of the end game, counsel or the parties can lose focus on opportunities for non-financial considerations, diluting a mediator's ability to explore important opportunities for resolution.

Mediator's proposals can have an important emotional effect in resolving a dispute. Risk benefit analyses are helpful. But the analysis is often done subtly, without spreadsheets, decision trees or much fanfare. When the parties come to the final issues, especially if they have become entrenched in their positions, they sometimes need time to reflect and consult with others. Most mediators and attorneys favor bringing closure while momentum exists. However, if true "impasse" looms in the sense that parties are genuinely considering walking away after much effort, and if a mediator's proposal holds the promise of closing a narrowing gap, it has the added benefit of allowing parties time to reflect, catch their breath, and digest the progress which has been made.

I have consistently found that when parties share their own numbers and percentage chances of victory, it invariably surprises them with a different settlement value than they had contemplated. Without the exercise, some mediators and counsel will look at the clock and try to fit round pegs into square holes. With enough force, something will emerge, but after signing off, the parties do not sleep very well and have difficulty explaining to their spouse, children or board of directors what they have done. ■

Greg Derin *is a mediator and arbitrator at Signature Resolution. He has been a professional mediator for 20 years. For eight years he assisted in teaching the Mediation Workshop at the Harvard Program on Negotiation. Greg can be reached at gderin@signatureresolution.com.*