Moving the Goalposts, How To Craft a Mediators Proposal

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As a professional mediator, some of my most challenging and, yes, enjoyable moments have come when I've been able to go "under the line." That is to say, I've been able to do things to increase the size of the pie that was presented to me when I first entered the room. Perhaps I was able to assist the parties in re-establishing a business relationship that had gone south and ended in litigation. Or maybe I was able to provide a safe haven within which somebody was able to commence the process of grieving.

But these occasions are the exception. In mediations involving commercial, business, contractual, employment, construction and insurance issues, the bottom line is most often dollars and cents. This is referred to as "distributive mediation," meaning that the size of the pie is predetermined, and the issue is limited to determining what size each claimant's slice will be. In my practice, I've developed a systemic method (sort of) through which I can narrow down my focus as much as possible in order to be able to insert my own proposal in a final effort to close the gap and obtain settlement.

A. The Purpose of the Mediator's Proposal

In many situations, as the parties make a series of concessions, they reach a point where each demands that the other make the final concession. There may be several reasons for this. Perhaps one of the attorneys is such an alpha personality that it is constitutionally impossible for him/her to settle without having the last word. Perhaps the attorney needs to tell a partner or an adjuster that he/she beat down the plaintiff to the very end. Perhaps a plaintiff's attorney feels unable to make a further concession in light of the anger his/her client already feels after so many previous moves.

A common solution for this is for the mediator to propose a settlement. When I do this, the terms are simple. I present each side with the same proposal. Each side has the same period of time to respond "yes" or "no." If I receive two affirmative answers, I congratulate the parties on their settlement. If not, I report that the case didn't settle. I explain to the parties that the beauty of this mechanism is that each side can take one final leap off the diving board, knowing that, if they don't do the same thing, the other side will never know that they made the leap. I refer to this as the "double blind blink." Each side gets the chance to blink outside of the vision of their opponent.

B. The Crux of the Problem

This should be self evident. Suppose that a plaintiff arrives at the mediation with a demand of $500,000 for personal injuries. Then suppose that the defendant arrives, with an adjuster, offering, say, $15,000. As a mediator, what possible number can you possibly choose with any hope that both parties might accept it. The answer? There isn't any. At least, not at that time. The art that the mediator must master is in reducing the size of the playing field; he/she must move the goalposts closer together, with or without the knowledge of the parties.

C. The Method As I Use It

I really do just two things. First, I assume that there's always a settlement number. That's because if the parties had a crystal ball and could predict, with certainty, the litigated outcome of the case, each would settle for that result, minus the cost of achieving it. Thus, the mediator, in an ideal hypothetical, ought to always have the joint cost of litigation as a buffer area within which settlement should always occur. Unfortunately, we don't have crystal balls, and parties and their attorneys evaluate cases very differently. So the first thing I do is give each party a continuing series of reality checks, playing upon their uncertainties, emphasizing my experience, and creating WATNA's (Worst Alternative To Negotiated Agreement) that they've likely never thought of. But, more importantly, I measure the playing field in several distinct phases. These phases are:

- The offer and demand at the outset of the mediation.
- The first serious offer and demand from each side.
- The bottom line (based upon my impressions) of each side.
- What each side thinks their bottom line is.
- The number that actually settles the case.

The first three of these ought to be easy for any experienced mediator. After all, the first is handed to you at the outset. The second ought to be available after a caucus or two. By serious offer, I don't mean serious by an objective standard, but, rather, a number reasonably calculated by the proponent to move toward settlement. The third number is where the mediator's art kicks in. There's no way to teach this; each mediation provides another learning experience. A good mediator pays careful attention to everything going on: what is said, what isn't said, the timing of attorney-client caucuses, intonations, facial expressions and body language, how devil's advocate arguments are handled, etc.

When I do this, and if I'm on my game, number four should come naturally. Again, based upon hundreds of mediations, I try to intuit what each side actually believes their bottom line to be. Sometimes, a party will tell me their bottom line, but even then, it may only be for publication to me, rather than accurate. The determination of a party's real bottom line is a subjective one and I have to make that call.

Once I've decided on number four, I move on to number five. By this time, the goalposts ought to be a lot, lot closer than they were at the outset of the mediation session. Now comes the hardest judgment. Which side is less likely to accept further pressure? Again, this is a purely subjective call. It has to be based upon every single thing that the mediator has learned during the mediation. The trick is to find the number that will be equally offensive to each side. When the mediator feels comfortable with that number, he/she is ready to make a proposal.

D. How This All Fits In

I don't like mediator's proposals! I cannot say that too often. It's always better if the parties themselves hammer out their own agreement with the assistance of the mediator. However, I believe that the mediator has an inherent conflict of interest. The mediator has, on one hand, an interest in providing the parties with the best possible environment within which they can decide how they want to proceed with their matter, but on the other. the mediator is being paid, presumably, by the hour or the day. It is this conflict that impels me to use the mediator's proposal. When I realize that a mediator's proposal is likely to resolve a matter in short order, whereas continued, very tedious, negotiations could go on interminably (often because of non-economic elements), I feel an obligation to offer this tool to the attorneys and/or parties.

My success rate with the mediator's proposal is extraordinarily high. And that never ceases to amaze me. If you agree with my reasoning, give it a try. If it fails, you can do as I have done, and suggest that the mediation continue.