



Often times toward the end of a day of mediation, when it looks like the parties cannot come to an agreement on the terms of a settlement, a party may request a mediator's proposal or the mediator may suggest it. A mediator's proposal is the mediator's recommendation to both sides of the terms on which the case should be settled. Each side then has a period of time (usually a day to a week) to accept or reject it.

In my view, the mediator's proposal is overused and abused. It is not an appropriate settlement technique in most cases, yet it is used too often out of frustration at the conclusion of an unsuccessful mediation. When is a mediator's proposal appropriate? First, a mediator should only make a proposal when all sides of the case request one or give their consent to the mediator making one. An experienced mediator should not impose his/her terms on the parties without their consent. Second, unless the parties are in a range within in which the case can be settled, a mediator should refrain from making a proposal even if the parties want one.

To put it in more positive terms, a mediator's proposal should be made only if the mediator believes that it has a reasonable likelihood of acceptance. The reason is that a mediation is a facilitative process with case evaluation to be used as a tool to bring the parties together. Mediation is not, nor should it be, a decision making process where the mediator decides who should win and how much should be paid. Moreover, a mediator's proposal takes on a life of its own in a case. If it is not accepted, counsel on one side or the other will say that the mediator thought the case should be settled at the amount of the proposal. As a result, an unaccepted proposal may hinder further settlement negotiations rather than help them and violate the do no harm principle of an unsuccessful mediation.

If the mediator's proposal is appropriate, the proposal should represent the mediator's belief as to the acceptable terms of a settlement to both sides. It should be the maximum amount the mediator believes that the defendant will pay and the minimum amount that the plaintiff will accept after having exhausted every opportunity to have the parties reach a settlement on their own. The proposal should not be what the mediator believes the case is worth or what a decision maker, judge or jury, might decide. A mediator's job is to facilitate settlement, not decide the merits of the dispute.

–Bruce A. Friedman