



## **Losing Control Over the Negotiating Process During a Mediation**

During the course of a mediation, there are opportunities for a party to exercise control in order to obtain the best result that can be achieved at a mediation. There are also critical points during the process when a party can lose control and cede it to the mediator and the other parties. A handful of examples will illustrate my point.

During a recent mediation where I served as the neutral, the plaintiff lender seeking to collect a real estate loan from a number of defendants confronted a negotiation in which the defendants put together an offer of approximately 50% of the outstanding loan balance. The defendants were willing to pay more, but not the full amount due. There were reasons for the lender to compromise. This was not a case where the issue was simply, "we made the loan and they owe the money." As the [mediator](#), I explained to the lender and counsel that the defendants were willing to pay more, but I needed their bottom line in order to go back to defendants to make a final push to the number. Rather than giving it their best shot, the lender postured with only a small discount off the principal of the loan. **THIS WAS A MISTAKE!** The lender ceded control of the mediation to the mediator to come up with what the mediator believed was the best number that could be reached with additional contributions from the defendants. The defendants rejected the lender's demand and then I pushed them to the number that I believed, but did not know that the lender would take. When I presented that number to the lender, the lender was disappointed. Although the lender ultimately accepted the amount, the lender would have exercised control over the process if he/she had discussed a realistic bottom line with me, the mediator, at what was a critical point in the negotiation. Perhaps the lender would have obtained a better result.

As the [mediator](#) in a second multi party real estate case involving claims of ownership of real estate and negligence of a real estate broker, I observed the broker and its insurer gave up the opportunity to settle by withholding settlement authority and thereby making themselves irrelevant to the negotiating process. **ANOTHER MISTAKE!** As a result taking themselves out of the mediation, the negotiation turned to a discussion of a settlement between buyer and seller who would then maintain their claims against the broker. The broker and its insurer failed to understand that in a multi

party context settlement is like leaking water. If the water meets resistance, it will alter course and flow in another direction.

The lesson is that there are times in a mediation when posturing may be appropriate and then there are other times when a party has to recognize that the negotiations have reached a critical point at which in order to accomplish a settlement a party has to level with the mediator as to what is the real bottom line. Failure to recognize that the time has come to make the move that will close the deal, even with the mediator's coaching, results in a loss of control and influence in the mediation. As an experienced litigator can attest, losing control usually means losing money.

-- Bruce

Bruce A. Friedman is a mediator and arbitrator with an international practice. With years of litigation experience behind him, he understands the goals of the mediation process and will do his best to ensure that the needs of both parties are met, justly and efficiently. For more information on the mediation services that Bruce A. Friedman provides, check out his website at <http://www.FriedmanMediation.com>, his profile at [ADRServices.org](http://ADRServices.org), or call him at [\(310\) 201-0010](tel:3102010010).