

SDNY MEDIATOR TIP SHEET: Mediator's Proposals – What, Why, and When

What is a mediator's proposal?

The parties have reached the end of the line and, despite your best efforts, no final resolution has been achieved. There is still a gap between the final demand and final offer, and neither side is willing to make a move. They have reached an impasse. As an alternative to closing the mediation without a resolution, the mediator may suggest a mediator's proposal as a means to reach a settlement, provided that all parties agree to entertain such a proposal. Mediator's proposals are provided to each side, and each side should reply confidentially to the mediator whether or not they accept. If all parties accept, you have a deal. If any party does not accept, all parties are told that there is no deal, without revealing who accepted or rejected the proposal. This aspect of a mediator's proposal is crucial because it means that no one loses the leverage of their last position if the proposal does not end the case. Should the matter not be settled, the mediator's proposal is a confidential communication not to be discussed or referred to in other aspects of the litigation. Almost always, a mediator's proposal is the last thing a mediator will do in a case, so everyone must be prepared that if the proposal is not accepted the referral will be closed.

Why make a proposal?

In general, a mediator might decide to offer a proposal because she: 1) feels that there is nothing else to be done to help the parties move forward; 2) believes that enough rapport has been established that a proposal might be favorably considered by all sides; and 3) because the mediator feels she has enough understanding about the parties and the matter that the proposal could be useful. If these circumstances all exist, the suggestion of proposed settlement terms enables both sides to accept (even if unhappily) a resolution of the issues between them. Proposals can be particularly useful if there is an outside person or entity (e.g. an insurance company, corporate or town board, involved family member, etc.) that might find the mediator's proposal to be persuasive justification for an enhancement of authority, or reduction in demand.

Timing and other considerations:

There is some skill in assessing whether the parties are close enough that a proposal has a chance of being accepted by both sides, yet not so close that the obvious solution—let's just split the difference—has not been proposed and accepted by them on their own initiative. If they have exhausted their reserves and are looking for an external “nudge” to get them over the finish line, now may be the time to suggest a proposal as a means of resolving the dispute. Sometimes, one side or another may ask for a proposal during the session as a means to bring it to a close. Resist that temptation, because the parties are likely acting out of frustration or impatience with the process instead of out of a reasoned determination that a proposal is likely to settle the case.

A mediator's proposal should not be used if there is anything else that the mediator could do to encourage the parties to move. A core value of mediation practice is party self-determination, and proposals shift the benefits/burdens of coming up with a settlement onto the mediator. By the time you are considering whether or not to offer a proposal, it is assumed that you have already explored all other means of encouraging the parties to make meaningful progress on their own initiative. Mediation is premised on the belief that the best way for parties to reach a resolution is for them to craft and control the outcome.

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Explaining a mediator's proposal:

Take the time to explain the process to the parties and be prepared to answer any questions they may have. If there are non-monetary issues in the case, point them out and state clearly that the proposal will or will not address the non-monetary aspects. Tell the parties that you will answer any questions they may have before they decide whether or not you should provide a mediator's proposal. Even experienced attorneys may provide their clients with a simplistic overview of the process and impart an erroneous message, along the lines of "the mediator thinks you should settle for \$x." With that in mind, cover the following points:

- A mediator's proposal is entirely voluntary. No one can force a party to go down that path.
- Solicit and honor any objections to the idea of a proposal (e.g. if any party has gone as far as they can go, and any suggested number below or above that point is simply fruitless; or if an attorney feels that a proposal might undermine their relationship with their client; or if any participant thinks the proposal might further entrench the dispute).
- A mediator's proposal is NOT an assessment of what the case is worth but rather the mediator's reasoned assessment of an amount at which the case might settle now.
- Rarely, if ever, are both sides happy with the proposed settlement amount. It is far more typical for both parties to be somewhat unhappy with the proposed amount, and that reaction is quite normal.
- The core question for each party is: "am I better off settling for this amount now or am I better off litigating for the next months/years with whatever uncertainty that brings?"
- Clearly describe the timelines and process.
- Explain your practice in formulating a proposal, for example: "I do not undertake a rote formula of splitting the baby in half; rather, I make an educated assessment of the matter based on what I have learned about the case, and having had the opportunity to meet with/speak with the parties and their counsel. If you wish, I would be willing to discuss the proposal separately with either side." This latter point is usually not part of the process, but at times it can be helpful to describe a reasoned basis for the proposal. For example, in an employment case, a mediator might indicate that the proposed settlement represents about "x" months of salary or "y" months of the costs of health benefits.

Should the mediator remain involved after a proposal has been rejected by one or both sides?

The mediator's proposal is supposed to be an "end game" process, after which the mediator's ability to function as a neutral is ended or at least compromised. On that basis, generally the practice should be that the mediator has no further role after communicating whether or not the proposal has been accepted by both parties. However, mediation is a flexible process and the mediator may consider participating further if both parties request further mediation, there has been a full discussion of the potential impact on the process of the mediator having made a proposal, and the mediator considers that she is comfortable in a continuing role. On confidentiality, note that while responses to a mediator's proposal are double-blind, counsel may choose to discuss their responses with each other to further bridge the gap in an attempt to settle the matter.

If the mediator determines that the proposal has impaired her neutrality, or the perception of neutrality, with one or both sides, the better practice would be to decline to continue (even if one side asks) and simply suggest that nothing stops the attorneys from communicating any additional information or proposals directly to other counsel.