

I reviewed with some dismay the July 12, 2009, post titled [Mediators' Proposals: the Good, the Bad and the Ugly](#), which seemed to endorse counsel who deceive the mediator to push the negotiations to a mediator's proposal. I primarily litigate, but I devote a small percentage of my practice to serving as a mediator.

A mediator's proposal can be a very effective tool for mediators and the parties to promote settlement when the negotiations have honestly and appropriately reached an impasse. The chance of the proposal generating a settlement, however, will increase greatly if the parties and attorneys respect the mediator and his or her opinion.

If the parties and attorneys respect the mediator, then they will respect the proposal, making it more likely that they will accept the proposal. Without respect, there is nothing more than a gambler's hope that the proposal will be in an acceptable range. Further, if the lack of respect is mutual, then there is a risk that the mediator will subconsciously tilt the proposal in favor of the other side, which certainly will not promote settlement.

Every mediation has some elements of a game, but while the gamesmanship can involve concealment and even some sleight of hand, it should not devolve into deception. One example that has worked well where there is complete trust and respect between the mediator and at least one side is for that side to divulge the final offer near the outset of the session with the understanding that the mediator will have some latitude to dole out the total authority in bits and pieces with the hope of settling at or near that final number. This is deceptive because the mediator is telling the other side that obtaining each "concession" is a hard fought battle, but it eliminates the risk of moving to quickly to the end game against an opponent who does not care what the opening number might be, but only wants to halve it (or double it) before the end of the day. This is deceptive because each private session with the side who divulged his or her final number is an opportunity to discuss future vacations and how the kids are doing. If, however, the goal is to reach a settlement that works for all concerned and gives all parties a sense of accomplishment, then it is a fine tactic that promotes efficient negotiations, likely avoids altogether the need for a mediator's proposal, and minimizes the fees of the attorneys and the mediator.

Candor and respect towards a mediator has an additional benefit that may not benefit the immediate clients, but will promote productive future mediations on other matters. If I can tell my client that a particular mediator is good, that I respect that person, and will seriously consider everything that that person says, then the client is more likely to listen to what could be bad news about the case. This level of respect is rarely earned in the first session with a new mediator, but only after several mediations. Without candor and respect, the attorneys and parties just want to "win" without realizing that the cost of "victory" may be dearer than the settlement obtained through a positive and respectful mediation.

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