

Mediator's Proposals? A Story...

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I have never been a great fan of mediator's proposals. I took the view that the mediator's job, done well, was to help the parties to come to a solution themselves. Party autonomy and all that. Achieving a satisfactory outcome, I thought, shouldn't require a specific suggestion by the mediator.

I have changed my view. As usual, experience is a great teacher. As is improvisation. Here's what happened. After several hours of to-ing and fro-ing, and with a still significant gap between them, the mediator brought the principals together to meet with him, without their legal advisers (and with the advisers' permission and encouragement). They talked for a while about their respective claims and approaches and what they thought they could and couldn't do. By this time, at least, they were treating each other with respect- and listening.

There came a point when it was obvious that neither could or would move further. Normally, at such a time, the mediator would resort to shuttle negotiation, trying to help the parties to narrow the gap. On this occasion, he asked them to indulge him. To the claimant, let's call him Peter, he asked the question: "Based on what you have heard from him, how much do you think [Jim] will actually be willing to pay to resolve this?" To Jim the question was: ".....how little do you think Peter will be willing to take?"

The mediator asked them to write down their respective answers on a piece of paper and hand them to the mediator. He said he would discuss the answers if he thought that could help them. After adjusting the numbers for interest and tax implications, he could see that the figures were closer than those in the traditional bargaining they had undertaken, understandably. That gave him a lever to pull on.

The mediator indicated to the principals that, with this approach, they were closer than before. That seemed to please them. He asked if they would be willing to permit him to select a number and give each of them a piece of paper with the number on it. All they had to do, as in the conventional mediator proposal tradition, was to mark it with a "Y" or a "N". He selected a number a little less than the figure indicated by Jim but significantly more than Peter's. He wanted to create some room for movement and to test the resolve of each. One said Yes and one said No.

The mediator spoke with one principal privately. The principal indicated that he needed just a little movement, to produce a figure his board would live with. If his counterpart suggested this figure, he would accept it. With his permission, the mediator took this to the other party who said that, if it would be accepted, he could deliver, albeit by overriding some resistance in his legal team. The mediator brought them back together and they did the deal themselves.

There was an apparent asymmetry in the approach here. The figure was at the top end of the range revealed in the first disclosure of figures to the mediator. However, in so far as one can ever offer a view on the merits, that asymmetry probably reflected the relative strengths of the parties' legal cases as the principals had come to appreciate, albeit without acknowledgement, in their conversation.

The learning: never be dogmatic, be prepared to improvise, take sensible risks, trust parties' instincts, not everything needs to be said, create environments for creative problem-solving by parties, help them in whatever way seems useful.....and take them with you always....

In another mediation over two days that same week, the mediator was able to set up the four principals as a joint dispute resolution board, which met frequently during the mediation, augmented when appropriate by lawyers and/or experts. That proved to be a fascinating vehicle for collaborative problem-solving in what was a complex construction dispute. But that's another story....