



WHAT IT TAKES TO SETTLE

I am a true believer in the evaluative approach to mediation. I not only enjoy engaging counsel and the parties in a discussion of the issues in a case, but I know that this discussion will eventually lead the parties down the path to settlement of the case. When the actual negotiation begins, I am a proponent of a principled negotiation in which the settlement offers and counter offers are tied to the evaluation of the issues of the case and the likelihood of success or failure at trial. But the evaluative method only goes so far. It is an effective way to narrow the gap between the parties, but it may not be enough to close the gap. I see this routinely in cases where one party has a much stronger case than the other and in light of the strength of the case and based on the evaluative approach, that party's last and best offer is close, but not enough to settle the case. The reason lies in the mediation process and the psychological effect on the party with the weaker case of having the mediator consistently holding up the mirror to the case and working that party up or down during the course of the mediation. Ultimately, I hear the refrain, "they just don't respect us and our case." In spite of my efforts to persuade counsel and party that it is not personal. It is personal for them.

After the evaluative method has been exhausted, and the parties have narrowed the gap between them, the question on the table is what does it take to settle the case. Should the party with the stronger case, make a final effort to bridge the gap? Is there a settlement premium that should be paid or accepted?

I believe that there is a settlement premium that comes into play and should be seriously considered for a number of very important reasons.

1. The evaluation approach is not science. Reasonable minds can differ. There is the old adage that even the best case has no better than 80/20 odds attached to it and no one could quibble with the odds dropping to 70/30 or even 60/40;

2. There is significant economic value in resolving a case. Savings of time, money, and the opportunity costs in devoting time to the case in mediation as opposed to others that may be more valuable or require attention.

3. The ability of the client to move on with life, close the file, move on to

the next matter are all real and psychological benefits of settlement. When you get to the point late in the mediation where the evaluative approach has narrowed but not closed the gap, I recommend your consideration of the settlement premium. I do not think that you will regret it. If you do, it will be with far less regret than getting close, but leaving with no settlement at all.

–Bruce A. Friedman