

Negotiation With The Mediator: Another Impasse Buster For Your Consideration

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You have reviewed and analyzed the mediation briefs and the parties have disclosed prior settlement negotiations and where they would like to end up at the conclusion of the mediation; or, the parties disclose to you during the course of early caucus meetings what they would accept or pay in settlement. Often, their goals are simply not in the same ballpark and a traditional negotiation, a series of demands and offers may not be the most productive way to proceed. In fact, it may be a very counterproductive method of trying to resolve the case.

What about having the parties negotiate with the mediator instead of one another? Instead of carrying a non-starter demand or offer to the other side, why not tell the plaintiff that based on your discussions with defendants, the amount that they are seeking is not in the range that defendants will pay. Of course, this can only happen after you have had a discussion with the defendants so that you can confidently make such a statement. The discussion will then turn to why the plaintiff's contemplated demand is too high in an effort to get the plaintiff to give the mediator a more realistic figure. The same discussion then occurs with the defendant as to why their contemplated bottom line is not realistic and does not properly assess the risk of loss. These discussions may lead to the mediator asking the counsel and party to give the mediator their bottom line to be kept confidential from the other side who will have a similar discussion with the mediator as to their bottom line. Parties rarely give the mediator the real bottom line which can only be tested when there is a realistic prospect of settlement, but this technique is useful in narrowing the gap between the parties without engaging in what is a prolonged and often contentious negotiation in which plaintiff's counsel will undoubtedly say that the defendant does not respect me and our case and defense counsel says that the plaintiff is not being realistic about the liability and/or damages issues.

Using this negotiation with the mediator methodology may result in the mediator negotiating with the parties all the way to the point where they separately agree on a settlement number and the mediator can announce that they have settled. Other times, the method will narrow the gap enough to start a negotiation in the zone of agreement in an effort to reach a settlement. Either way, this approach to negotiation can serve as an impasse buster without alienating the parties to

the suit. It is not an appropriate method for all mediations, but one to be considered under circumstances where the parties are too far apart to engage in a meaningful negotiation and a traditional negotiation between the parties is likely to create an insurmountable impasse early on in the mediation.

Bruce A. Friedman is a mediator with a national practice. With years of litigation experience behind him, he understands the needs of the parties and counsel in the mediation process and will do his best to ensure that they are met. For more information on the mediation services that Bruce A. Friedman provides, check out his website at <http://www.FriedmanMediation.com> or call him at (310) 201-0010.