

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



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IT'S JUST AN OFFER: Thoughts on Initial Settlement Proposals in Divorce

August 12, 2019 | by

Clients and attorneys generally want to settle cases out of court. Clients readily recognize the financial and emotional benefits of avoiding court. Some clients go into his or her attorney's office, bound for the courthouse, but most want the case to be settled. Clients also routinely want the settlement terms to be *fair*. However, what is fair is more subjective than each party tends to realize and is influenced by each party's perspective. In other words, what is fair depends on who you ask.

The negotiation process to try to settle divorce cases, as well as other types of cases, requires each party to make and receive offers and counteroffers. This article focuses on the initial proposal and counteroffer in these negotiations. The context of the offer and counteroffer can take place in a formal mediation setting or the exchange of emails or letters between attorneys. I warn clients that the first offer or counteroffer, depending on what side makes the first settlement proposal, will be outrageous. I tell clients not to be surprised if the first settlement proposal from the other side leaves them believing mediation is a waste of time, or frustrated and angry. I remind clients the proposal is just an offer, and they are not obligated to accept the terms proposed. In other words, we can formulate a counterproposal for the mediator to present to the other side.

Despite all that, clients understandably find it difficult to listen through the entire readout of the initial settlement terms proposal. The natural tendency is to start responding to the proposed terms before the mediator has had a chance to set out all the terms. The clients' responses all too often come across as frustration with the mediator. I, therefore, caution clients in mediation preparation to resist the urge to take out their frustration on the mediator, that is, "don't shoot the messenger." I know from experience that initial offers mark the *beginning* of the negotiation process, not the *end*. If every mediation ended abruptly as a result of the parties' responses to initial settlement proposals, mediation as an alternative to court would not have achieved its historic success. I am confident I have made offers and counteroffers on behalf of my clients that probably engendered hostile reactions from our opponents. However, it's important to note the proposals were never designed to jeopardize the likelihood of reaching a settlement. Fortunately, initial offers and counteroffers rarely do.

The common analogy I use to help clients understand the dynamics of the settlement process is the car buying negotiation process. While buying a car is certainly not as multidimensional as the break up of a marriage or a custody dispute between parents, the setting is one with which nearly every person can relate. The car buyer never walks into the dealership and pays the sticker price, and the salesperson never takes the car buyer's first offer. Both parties to the transaction leave themselves some room to negotiate. This same strategy happens in the much more complex context of negotiating terms of a divorce or terms of child custody. Therefore, I encourage you to prepare to be disappointed with the first proposed settlement, but don't shoot the messenger and remember it's just an offer.

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