The Use of Mediator Proposals in Practice: What the Data Tell Us

By Debra Berman

A mediator proposal is a mediator's objectively analyzed "best guess" about a final settlement number both sides would accept. Mediator proposals have become an increasingly common and effective technique used to break impasse.[1] However, neither the ABA Model Rules of Professional Conduct nor the Model Standards of Conduct for Mediators address mediator proposals, and there is little research on the timing, format, and substance of mediator proposals.

For instance, regarding timing, a mediator could provide a proposal to the parties at the end of the mediation session itself or wait and send the proposal following the mediation. The format of the proposal could be verbal, an informal written communication such as an email, or a more formal document. The substance could simply be a proposed number for a monetary settlement, a detailed and reasoned analysis, or something in between. These differences are not insignificant and deserve further research. A single dollar amount differs significantly from an in-depth legal analysis that takes on the qualities of a reasoned arbitration award or a case evaluation.

These different approaches raise questions not only about how mediators actually use mediator proposals in practice, but also about how mediators should employ and structure them. Mediator proposals could (and probably should) be based on the wishes of the attorney representatives and the parties themselves. But the approach to mediator proposals often comes down to the mediator's individual style, practice, and beliefs about their role.

The increasing popularity of mediator proposals suggests that the time has come to develop a set of research-based best practices. To facilitate development of best practices, this article offers empirical data from a survey of 167 mediators in the United States. The survey data shows that a significant majority of mediators use mediator proposals in their practices. The data also provide insight into the general trends of how mediators employ these proposals.

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Survey Participants

To research these issues, I contacted several ADR groups with an online survey. Groups included the Association of Attorney-Mediators, the American College of Civil Trial Mediators, the Houston Bar Association ADR List Serve, the New York State Bar DR List Serve, the Dispute Resolution Legal Educators List Serve, the American Bar Association (ABA) Section of Dispute Resolution Mediation Committee, and selected mediators and litigators active in the ABA Section of Dispute Resolution. In total, 167 mediators from 30 states responded to the survey.[2] Of the 167 survey participants, 79 percent primarily practice as mediators, 29 percent primarily practice as arbitrators, and 21 percent primarily practice as litigators.[3]

Overall, the 167 survey participants represented an experienced group of mediators. Almost half of the participants reported that they had conducted more than 500 mediations. Twenty-eight percent had conducted between 100 and 500 mediations, and the remainder had conducted fewer than 100 mediations. As for practice areas, a majority of participants reported that they are involved in commercial mediation, a significant minority handle personal injury matters or specialize in labor and employment mediation, and some focus on other specialized areas such as family and consumer mediation.

How Often Mediator Proposals are Being Used

Eighty-four percent of respondents reported that they had used a mediator proposal. The more experienced mediators were more likely to offer mediator proposals. Of the mediators who had conducted more than 500 mediations, 94 percent had used a mediator proposal. However, even for those who had conducted fewer mediations, the percentage was still high. Eighty-two percent of mediators who had conducted 50 to 100 mediations reported having used a mediator proposal. And for those respondents who had conducted fewer than 50 mediations, 68 percent still said they had used a mediator proposal. A clear majority of mediators, whether highly experienced or not, had used the mediator proposal in their practices.

Proposal Timing and Format

According to the survey, 38 percent of mediators provide their proposals verbally to the parties at the end of the mediation, while 55 percent provide their proposals in a more formal written document after the mediation has concluded. Several respondents recommended that if the proposal is provided after the mediation session has ended, the proposal should be in writing. Within this latter group, several participants commented that they not only give the parties a written document, but they also require the parties to respond to the proposal in writing. Typically, a written proposal includes proposed settlement terms and instructions on how to accept, along with a deadline for acceptance and confirmation that an acceptance will remain confidential unless the proposal is accepted by all parties.

There are also differences in timing. For example, some mediators who provide a verbal proposal at the end of the mediation session request an answer immediately while others give the parties a certain number of days to make a decision.

Reasons for Post-Mediation Written Proposals

For respondents who put their proposals in writing, 45 percent remarked that clarity was a primary reason for doing so. By putting the proposal in writing, the mediator can ensure the terms are clear and complete and the conditions and time of acceptance are specifically stated. This avoids different interpretations of a verbally transmitted proposal and provides assurance that both sides see the same terms in the same language.

Survey comments also noted that written proposals can improve the chances of acceptance because they help parties avoid knee-jerk reactions. Parties have

time to review the proposal and think things over thoroughly before responding. Some respondents stressed that the formality gives the proposal a more serious tone and lends weight to the proposal. A written proposal can also be forwarded "up the chain" to those with greater authority. Some mediators want the parties to have something to present to decision makers with authority to settle who did not attend the mediation itself.

Substance of the Proposal

Other significant survey results related to the substance of the mediator proposal. Almost 70 percent of respondents said they either never or rarely provide a reasoned analysis along with the proposal. Twelve percent responded that they almost always provide a reasoned analysis. Eighteen percent stated they sometimes provide a reasoned analysis. The survey then asked mediators who provide an analysis whether they do so in response to requests from lawyers. Sixty-eight percent of respondents said that although they provide a reasoned analysis, lawyers never or rarely ask for the reasoning.

Although mediators generally choose to provide a detailed analysis without requests from the lawyers, that is not always the case. Twenty percent of respondents stated that lawyers sometimes ask for reasoning and twelve percent stated that lawyers always or very often ask for reasoning.

Content and Basis for Providing a Reasoned Analysis

Survey respondents who indicated they provide a reasoned analysis were asked to describe the substance of the analysis. Primarily, topics identified included legal issues, factual issues, legal merits of the case, and strengths and weaknesses of the case. Some respondents said they discuss the impact of not settling, including what a court might do if the parties did not reach a settlement, general cost issues, and cost framing in comparison to the variance between previous offers.

Most mediators commented that they provide a reasoned analysis because explaining the proposal makes it more persuasive. Some respondents thought a reasoned analysis makes the proposal more credible. Most comments, however, indicated the reasoned analysis was a mechanism that allows lawyers to summarize and organize the basis of the proposed number for their clients. One respondent explained that parties need to understand what supports the number so they can reevaluate their positions. Another respondent stressed the importance of emphasizing the logic and foundation for the proposal since parties need some explanation.

Arguments Against Providing a Reasoned Analysis

Several respondents commented that they would never provide a reasoned analysis because it would compromise their neutrality and impartiality. One respondent explained that providing a reasoned analysis requires the mediator to take a position and pass judgment on the merits of the parties' arguments, which goes beyond their role as a neutral facilitator. Others commented that analysis is not necessary because by that stage in the mediation, rationales for particular numbers have already been discussed exhaustively. By the time of the proposal, the parties are bartering, and they simply need one last push on a dollar amount.

The majority of comments against providing a reasoned analysis had nothing to do with the role of the mediator. Rather, the comments show strong agreement that providing a reasoned analysis is simply not helpful and can actually serve to further polarize the parties. Rehashing arguments and providing the parties with avenues to challenge narrow factual or legal matters simply raise the risk of thwarting settlement. In fact, one respondent noted that "tying the number to the mediator's opinion on risk only causes the parties to simply disagree with the analysis."

Mediator Proposal Acceptance Rates

The survey also asked respondents to identify the acceptance rate for their mediator proposals. The average came in at 73 percent. Generally, mediators should be highly certain that the parties will accept the proposal.[4] One respondent suggested choosing a number the mediator knows will result in serious consideration by both sides. Another respondent remarked that the negotiations need to mature to such a degree that the mediator knows the proposal is likely to be accepted. While the 73 percent figure

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provides a helpful starting point, future research might assess whether variations in proposal substance have an impact on the acceptance rate. Some of the comments for and against detailed mediator proposals expressly or implicitly indicated a concern that different levels of substantive detail could impact the chance of settlement.

General Insights

Mediator proposals are a powerful tool in the mediator's toolbox. But they should not be overused as a fallback or crutch for mediators or advocates. When asked to provide general comments about mediator proposals, most survey respondents urged caution and warned that mediator proposals should be used "sparingly, judiciously, warily, rarely, carefully, and as an absolute last resort" when all other impasse-busting techniques fail. A handful of respondents expressed concern that proposals can undermine party self-determination, violate a mediator's neutrality, and move the mediator into a role more closely aligned with an arbitrator. One respondent specifically commented that "proposals should be used infrequently since the mediation process is designed for the parties to come to their own resolution." One way to mitigate this concern is to offer mediator proposals only at the request of and with consent of the parties, not on the mediator's initiative.

The majority of survey respondents, however, generally supported mediator proposals as long as the mediation process has been thoroughly exhausted and the parties are truly at impasse. Several respondents recommended that mediators should resist a proposal for as long as possible. In fact, 30 percent of respondents felt that lawyers tend to request mediator proposals too early in the process. As one respondent noted, mediator proposals should make sure the parties' last offers are close enough that they are likely to accept the number.[5] Mediator proposals, as one respondent noted, should be strategic and more than just "splitting the baby." The optimal number, according to another survey respondent, is a number that "will stretch both sides to a place where they can feel that if the other side agrees to the proposal, it makes sense to accept it."

Some survey respondents suggested that mediators must make it clear that the proposal is not designed to establish a new negotiation platform and the parties must take it "as is." On the other hand, some remarked that the proposal could serve as a basis for continued negotiations. One respondent noted that "there is life after a 'failed' proposal," and a deliberate strategy may lead to a successful second proposal.[6] Another respondent even commented that the parties continue to negotiate following a proposal approximately 25 percent of the time.

Many respondents specifically urged caution about using mediator proposals too often. If overused, mediators can get a reputation for always using proposals, and parties may stop making compromises on the theory that the mediator will give their proposal anyway, so there is less reason to put in the effort to really negotiate. One respondent felt that "too many lawyers come in expecting to negotiate to impasse and then rely on a mediator proposal to cross the last bridge." Another respondent said, "I avoid using the mediator's proposal because people in subsequent mediations wait for the mediator's proposal instead of working toward an acceptable settlement number on their own." If a mediator becomes known for using proposals, parties may mediate expecting a proposal to be forthcoming.

In Conclusion

The survey data reveal that mediator proposals are used by mediators in almost all stages of practice. However, there is no one universal understanding of the timing, format, or substance of a mediator proposal. In fact, what a mediator's proposal purports to be varies among mediators.

Nonetheless, the survey data does suggest that there are some common practices. For example, almost all respondents agreed that mediator proposals should be used sparingly as a "last ditch effort" only after the parties have truly reached impasse. Many respondents recommended that proposals

should only be done at the request of the parties. And finally, as most respondents indicated in the survey, a mediator proposal is intended to simply be a proposed settlement number as opposed to a commentary on the legal merits of the case. As mediator proposals continue to become more commonplace, mediators should embrace additional guidance. Further research is surely warranted. ■

Endnotes

1 Daniel Klerman & Lisa Klerman, *Inside the Caucus: An Empirical Analysis of Mediation from Within*, 12 J. OF EMPIRICAL LEGAL STUD. 686, 696 (2015) (noting that mediator proposals are a very common closing technique).

2 Almost half of the respondents practice in Texas. Other highly represented states included California, Florida, Georgia, and New York.

3 The percentages add up to more than 100 because respondents were not limited in this question to only one answer.

4 Stephen Hochman, *A Mediator's Proposal—Whether, When and How it Should be Used*, 30 ALTERNATIVES TO HIGH COST LITIG. 121 (2012) (explaining that mediators should choose a number they believe has a good chance of being accepted).

5 Klerman, *supra* note 1, at 697 (noting the potentially harmful effects of mediator proposals if the parties are too far apart).

6 Dwight Golann said, "Consider making a second proposal if the first one doesn't work. It may not yet be the end of the mediation. If a party says no, ask them what they will offer instead. Often, having been able to say what they won't do to the other side and the mediator, or learning that the other side really won't go where they want them to, they will be willing to compromise."

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