Plaintiff

The Mediator's Proposal

Do you expect a proposal from the mediator? Is the proposal a tool, or a crutch?

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As a dispute management strategist and mediator, I am intrigued by the sudden popularity in party reliance on the mediator's proposal. This article will explore what constitutes a mediator's proposal, what has prompted its increased use, examine the basis for such dependency, explore the potential risks for the parties *and* the mediator, and contemplate some of the ethical and potential legal issues associated with using the procedure.

Process

Defining a "mediator's proposal" is like nailing Jell-O to a tree – it is all over the place. Mediator Forrest Mosten defines the concept as "... a mediator communication that recommends a particular outcome with respect to a disputed issue or a series of issues."[1] Some say that it is the mediator's assessment of what is fair; while others say that it is not the mediator's assessment, but what is "in reach of all the parties."[2] According to family mediator, Zena Zumeta, the mediator's proposal, "directly influences the outcome of mediation." No matter how the technique is defined, the common denominator amongst all of the definitions is that the *mediator* is the one telling the participants what the *mediator* thinks is the case-specific, appropriate solution.

For those who regularly incorporate the mediator's proposal into their practice, the literature provides many caveats and suggestions for "do's" and "don'ts."[3] Most suggest that the mediator's proposal come at the end of the mediation, when there is an impasse – no sign of settlement. As one mediator points out, it is the mediator's "silver bullet" and needs to be used with a "high level of discretion." Some mediators say that the proposal should be given only when the participants ask. Others provide their opinion, whether asked or not, just as standard practice.

Mediator proposals seem to run the gamut from a specific figure to a range for settlement, presented verbally or in writing, and from a single number to a detailed settlement document. Some-times the proposal is given in joint session; however, most times it is done in caucus and is presented as a "blind response", where participants only know if it is accepted or rejected.

Evolution

Some thirty-five years ago there were two primary mediation styles or models: facilitative and evaluative. For the most part, facilitative mediators primarily handled family issues, came from social science backgrounds and focused on collaborative problem solving. The client's decision-making criteria were paramount and focused on relationships and finality. Evaluative mediators primarily came from legal backgrounds, and the focus was purely on a settlement with the decision-making criteria being what was right under the law.

There appear to be a number of factors that have fostered the evolution and increased use of what is now labeled the mediator's proposal. Having the mediator provide an answer made it easier for the unprepared or for those who had over-promised. In addition, it provided an out for attorneys if the case did not settle: the mediator became the perfect scapegoat for the failed mediation.

It was easy for those who had little mediation training to tell people what to do or what was the "right" answer. Egos thrived in the "I have mediated 100 cases and I settled 99 of them!" environment. Such insufficient training, coupled with a fear or inability to deal with participant emotions, also helped foster the growth of the mediator's proposal.

The practice of a mediator suggesting terms for a settlement is not new. Mediators have given their opinions, made predictions of how a particular judge would rule, and speculated on the strengths and weaknesses of a case for decades. What is new is the label. Removing the approach of "telling people what to do" out from under the evaluative umbrella and attaching a specific label – mediator's proposal – has bestowed legitimacy on the procedure.

Necessity

One needs to ask the question, "Is a mediator's proposal necessary?" Could it be that if more mediators possessed or were willing and able to incorporate a wider variety of skills and techniques, then the mediator's proposal might quietly slip away?

Some, who support the use of the mediator's proposal, justify the practice by saying that it is done primarily because attorneys request it. If that is a reason for integrating the mediator's proposal into one's repertoire, then what might be driving such a request? Is the attorney unprepared, or has the attorney made some mistake and hopes that a quick settlement driven by the mediator will help cover those sins?

Does the attorney claim "I cannot control this client," or is the attorney not listening to the client's needs, which may be very different from those of the attorney's? Often there are clashes between attorneys and their clients, which develop from each using different decision-making criteria. Typically, attorneys use the law as their primary decision-making factor, which prompts them to recommend acceptance or rejection of an offer. Clients, on the other hand, rarely use the law as a basis for their decisions. They are far more likely to consider finality, confidentiality, fairness, relationships, financial factors and a host of other criteria.

It could be that some attorneys seek a pronouncement from the mediator so if they do not like the proposal, especially if the mediation fails, there is someone else to blame. Of course, there are those who, if they like the mediator's proposal, then rely on the mediator "pounding some sense into the other side."

It has been noted that some encourage a mediator's proposal to "save time." If the proposal is used to speed up the process, there appears to be a greater probability of "buyer's remorse." No matter what motivates an attorney to request this alternative, by having an outside third party determine what is the "right" answer, the actual stakeholders are removed from taking responsibility for the outcome.

The mediation environment is rife with one key assumption that may also drive the use of the mediator's proposal – every case is about money. Accepting that hypothesis as fact narrows the settlement focus, and creative or more encompassing customized solutions are not considered and never see the light of day. Thus, many parties feel unsatisfied after mediation because their basic, nonmonetary needs have not been addressed.

Deficient skills may drive proposals

Skill deficiency was and continues to be a major mediator proposal driver. There is a huge difference between conducting "reality-testing" versus a mediator telling people what to do. Asking good open-ended questions to draw out information is an often-missed opportunity. If the parties do not exchange information, then it is impossible to effectively negotiate. Conducting a risk analysis and having the attorney provide the numbers is distinctly different from the mediator proselytizing or even speculating about the case. Sometimes integrating a truly neutral expert into the negotiation discussions can help the participants better assess the situation, find common ground and generate options – all without the need for a mediator's proposal.[4]

Making declarations and providing solutions that the mediators deem are what people "should" do is a far cry from asking hypothetical questions, or asking the attorney, "In your experience, what have other clients done?" These techniques help develop settlement options, and these options come from the participants. This in turn minimizes the need for a mediator's opinion. Maybe the mediator does not know about risk aversion, over-optimistic and confirmation biases, reactive devaluation, litigation fatigue, anchoring, and other psychological influences, and may not have the training to work through these challenges – thus the mediator's proposal has become the easy default.

Perhaps for some, the necessity for the mediator's proposal is avoidance of dealing with emotions. When people from professional backgrounds that focus on fact-based decision-making encounter an individual who is emoting about the impact of an event on their life, they can find the situation quite daunting. Many mediators – and attorneys – are unprepared to meet this challenge. It takes skill to effectively acknowledge another's emotions, let alone permit that person to fully explain the situation. It is interesting to note that when mediation participants do not feel that the mediator has listened to their concerns, they are more likely to question the mediator's impartiality.

Risks

There are three significant risks with the over-utilization of the mediator's proposal. First, the mediator is presenting a solution that he or she thinks is the *correct* one, or it may be based on what the mediator perceives is something that the parties will accept. The problem is that the mediator bases the proposal on what has been gleaned from conversations with the participants. There is no guarantee that the information provided is accurate, let alone truthful. Often there is a great effort on the participants' part to mislead the mediator.

Second, when the participants understand that the mediator is prone to making proposals, they lose the incentive to prepare or to actively participate in the process. They want lots of caucus time, so they can attempt to "game" the process or influence the mediator, and therefore impact his or her proposal.

Third, the introduction of the mediator's proposal changes the character of the process. There are a number of writers who claim that cases driven by the mediator's proposal, and especially those essentially run entirely in separate caucuses, are not mediation, but a completely different process – neutral evaluation.[5] Mediation and neutral evaluation are two distinctly different processes, and expectations of the role of the neutral process manager are very different. Still others liken the modified mediation process that always incorporated a mediator's proposal as being more akin to non-binding arbitration and settlement conferences.

In any of these circumstances there is an impact on disclosure of information. When the parties understand that the mediator will later evaluate the facts, make a decision, and then provide a "recommended outcome," they will be less forthcoming. Potentially critical information that might ordinarily be disclosed during caucus will be withheld.

Ethics and more

When and how the mediator's proposal comes about may raise ethical questions. If mediation is based on voluntary settlement, is that concept compromised when a mediator says, "This is the right answer"? Although there are those who argue that the parties do not have to do what the mediator says, the reality is that a person in a leadership role or position of authority does have a strong psychological influence. This is especially significant when that person is a retired judge. This phenomenon is especially present when dealing with self-represented litigants (SRL).

Another question that comes up when SRLs are participating in mediation: "Is the mediator's proposal a form of legal advice, and if so, has the mediator changed hats from a neutral to an advocate?" What if the mediator is not an attorney? Does this raise the question of the unauthorized practice of law? If there are two self-represented litigants, is there a question of dual representation if the mediator is an attorney? Some states are reviewing these and other questions to determine if the mediator's proposal is compatible with existing mediation statutes and codes of conduct.

Lingering questions

Were mediator proposals always present, just unnamed, in the evaluative mediation model? Is it a coincidence that the mediator's proposal has increased as the use of an initial joint session has decreased? Does using the mediator's proposal shorten the time of a mediation, and if so, is that a good thing? Presently there is no consensus on these topics.

Are the mediation participants better off with the use of a mediator's proposal than attempting to negotiate their own settlements? Interestingly, there is no evidence that settlement rates are higher when a mediator's proposal is used. Further, there appears to be some evidence that there is less satisfaction with the process when a mediator's proposal is used.[6] Mediator proposals may well have a place in resolving disputes; however, these two significant questions remain, "Is it over-utilized?" and "Is the process still mediation?"

Conclusions

Just as a carpenter would not use a screwdriver to cut a board in half, so too should mediators avoid using the wrong tool. The mediator's proposal needs to be used judiciously, when all other techniques fail, following consideration of the consequences, and with the willingness of all of the participants. If a mediator only has a hammer in the toolbox, then everything will look like a nail.

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As of February 2019:

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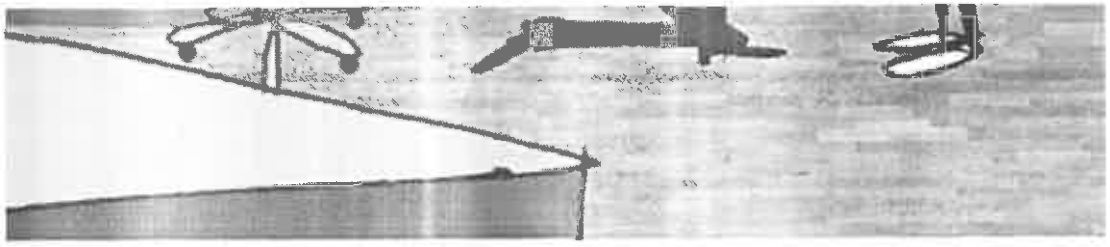

"That's not the mediator's proposal I expected."

Endnote

[1] Forrest S. Mosten, *Mediator Settlement Proposals*, ACR Commercial Section Newsletter, August, 2015.

[2] John DeGroote, *The Mediator's Proposal: A Great Tool for Yesterday's Disputes*, Settlement Perspective blog, Dec.12, 2008.

[3] Margaret Shaw, *Mediator Proposals: Let Me Count the Ways*, ABA Dispute Resolution Magazine, Winter, 2012.

[4] Bill Eddy, *Should Mediators Make Proposals?*, blog, 2014

[5] Constance J. Yu, *Revisiting Mediators' Proposals After Bowers v. Lucia: What Litigants Can Do to 'De-Fuzzy' the Mediation Process*, California Minority Counsel Program Newsletter, February, 2013.

[6] Richard C. Kearney and David G. Carnevale, *Labor Relations in the Public Sector*, 3rd ed., New York, NY: Marcel Dekker, Inc., 2000.

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