

How I Learned to Love Mediator's Proposals

Why modern mediation sometimes calls for a guiding hand

SHIRISH GUPTA

JAMS Mediator, Arbitrator, Court-Appointed Neutral (Referee/Special Master), Neutral Evaluator

A lot has changed in my approach to mediator's proposals since I became a mediator in 2010. One school of thought then was that mediator's proposals were unethical because the mediator was putting their thumb on the scale in favor of one party or the other. Similarly, one experienced mediator said that settlements should be based on the parties working it out, not the mediator dictating the result.

Early Reflections

I started out questioning whether to make mediator's proposals. I thought, "Who cares what I think? I'm a young lawyer with little mediation experience, whereas counsel may have been practicing longer than I've been alive." Granted that I had over a decade of litigation experience, but that gave me just enough confidence to be in the room and guide the discussion, not direct it.

The Facilitative Mediation Philosophy

Additionally, California mediation training programs emphasized a facilitative over an evaluative or directive approach. So, I was a young neutral wanting to give the parties agency via facilitative mediation. On a couple of occasions, I even conducted entire mediations in joint session. (Those matters resolved, in case you were wondering.) A mediator's proposal was considered the domain of the lazy mediator or a directive one who had an end result in mind and would spend the day getting the parties to accept it.

A Shift in Approach

The past 15 years have changed my thinking on the subject. Nowadays, it is the rare mediation that doesn't settle after a proposal or mediator's bracket along the way. Almost all of my matters end with a proposal. In one recent case, the parties were

struggling with the basic question of whether they were going to reconcile or end their partnership. It took three rounds of mediator's proposals to reach a settlement. This was after spending 35 hours with the parties, exchanging round after round of offers and asks, and doing a deep dive into the underlying business, what each side could accept, their must-haves and their redlines. The proposal covered nearly 20 points and ran four single-spaced pages. I doubt it would have settled any other way. By the time the parties came to me, they had tried both direct negotiations and mediations with two different mediators. All ended in impasse.

Recognizing the Value of the Mediator's Role

Little by little, I've come to realize that the parties have chosen me for a reason. I'm no longer the free mediator they get as part of a court's or bar association's program. If they're going to go through the effort of jointly agreeing to use my services, preparing for the session, spending the day with me, getting my evaluation of their claims/defenses, and seeking and obtaining my negotiation guidance, then I have to believe they want to know what I think a possible resolution is. They may not be thrilled with the proposal, but they should not be surprised by it. And if I've read the room correctly, both sides should be able to get to yes.

Ethical Considerations and Final Thoughts

As to my original ethical concerns, if one side believes that a proposal will interfere with their negotiation strategy, they can ask me to not make one in the first place. It's not my practice to make a proposal where one side does not want me to. As to the fear that a mediator's proposal is putting my thumb on the scale, any proposal is a judgment call and it's rare that only one potential outcome resolves the dispute. Usually, there are a range of options. In other words, the zone of possible agreement is not just one point. My goal is to offer a resolution that I think the parties will accept. And at the end of the day, it is their call to accept or reject it.

EXPLORE MORE ON THESE TOPICS

MEDIATION

Disclaimer:

This page is for general information purposes. JAMS makes no representations or warranties regarding its accuracy or completeness. Interested persons should conduct their own research regarding information on this website before deciding to use JAMS, including investigation and research of JAMS neutrals. [See More](#)