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Reimagining the Mediator’s Settlement Proposal

Theo Cheng and Harold Coleman Jr.¹

In this article, the authors suggest that a mediator’s settlement proposal be delivered using a thoughtful, specially constructed writing.

Impasse in a mediation is sometimes referred to as a “deadlock”—a situation in which the participants have become firmly locked into their positions or have exhausted their ability to make demands and offers. But impasse is frequently the very reason the parties have agreed to conduct a mediation process. That is, they have decided to engage a disinterested third party—the mediator—to assist them in their negotiations because they have exhausted their own resources and abilities to reach a resolution. Thus, when parties arrive at an impasse during a mediation, it is really the second time they have gotten stuck. This can be doubly frustrating and difficult for the parties and their counsel. Parties try in vain to avoid impasse at mediation; rather, impasse is the very condition that drives them to mediation!

Of course, mediators are trained to have in their “toolkit” a number of impasse-breaking techniques, such as taking a break, telling stories, brainstorming, sending over trial balloons, reality testing, instituting bidding auctions, and using brackets. Classic

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mediation training also teaches the concept of a mediator's proposal as an impasse-breaking technique. This is the technique where the mediator—hopefully, only after receiving informed consent from each of the parties to do so—crafts a proposal for the parties' consideration. The proposal is generally circumscribed under the following conditions:

1. Each party must accept or reject the proposal on the exact terms proposed, without any modifications, in a confidential communication to the mediator;
2. If, and only if, both responses are "yes," the mediator's proposal becomes the resolution between the parties; and
3. If even one party says "no," there is no resolution (at least on the terms and conditions proposed by the mediator).

Thus, in a situation where no resolution is achieved and one party has accepted the proposal, that party never reveals to the other party that it would have been willing to accept the proposal, thereby preserving that party's negotiating leverage. Notably, the mediator's proposal is not an evaluation of what the dispute might be worth and is not a measure of what the mediator believes is a "fair" outcome or an outright recommendation that the parties resolve their dispute under the terms and conditions in the proposal. Rather, it is the proposal that the mediator believes, based solely upon the information the mediator has reviewed and learned to-date—through both pre-mediation communications (including the parties' pre-mediation statements) and at the mediation session itself—has the best chance of being accepted by both sides and result in a resolution of the dispute at that time.

Disadvantages of the Classic Mediator's Proposal

Classic mediation training also teaches that a mediator's proposal should be utilized as an impasse-breaking technique of last resort after the mediator has exhausted all other impasse-breaking efforts. The reason for that adage is threefold.

First, a mediator's proposal encroaches upon party self-determination.² Because it is the mediator who is crafting the proposal, and not the parties themselves, the mediator is, in some sense, taking away some measure of the parties' abilities to determine for themselves a free, voluntary, and informed choice as to the resolution of the dispute.

Second, delivering a mediator's proposal can compromise mediator impartiality.³ Because a mediator's proposal could be perceived as favoring one party's position(s) over the other par-

² See, e.g., Model Standards of Conduct for Mediators (2005), Standard I.A. & B. ("A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes."); Model Standards of Practice for Family and Divorce Mediations (2001), Standard I.A. ("A family mediator shall recognize that mediation is based on the principle of self-determination by the participants. . . . Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions."). Self-determination is also the reason why prior informed consent from the parties about the mediator's proposal procedure is critical for the mediator to ascertain before undertaking to deliver a mediator's proposal. This is, after all, the parties' process, not the mediator's process. Self-determination recognizes that the "problem" sought to be addressed through mediated settlement discussions/negotiations essentially belongs to the parties themselves . . . not to mediators, arbitrators, judges, or juries. It is the bedrock principle by which astute mediators come to realize that it is not mediators who settle cases; rather, it is the parties that voluntarily opt to do so on terms acceptable to themselves.

³ See, e.g., Model Standards of Conduct for Mediators (2005), Standard II.A. & B. ("A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice. . . . A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality."); Model Standards of Practice for Family and Divorce Mediations (2001), Standard IV.A. ("A family mediator shall conduct the mediation process in an impartial manner. . . . Impartiality means freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.").

ty's, the parties may come to view the proposal as exhibiting some kind of favoritism or bias towards one party against the other.

Third, a mediator's proposal—despite all caveats and admonitions to the contrary—might unwittingly be construed as the actual settlement value of a case, thus anchoring a party in its polarized position and hindering further settlement attempts.

Mediators' proposals are also traditionally delivered orally by the mediator to each of the parties during the mediation conference—usually, separately in caucus—with a short amount of time given to respond; oftentimes, the parties will mutually agree to respond on the spot. This only compounds the problem by rushing parties into either accepting or rejecting a proposal that they themselves did not fashion or have any hand in crafting. Moreover, as a by-product of this procedure, hearing the proposal delivered orally by the mediator creates two distinct neurological impediments to a successful resolution.

The first is the phenomenon of anchoring, which is the cognitive bias that occurs when someone uses or relies too heavily on an initial piece of information that is received, fixating on it as a reference point and, thereafter, basing all subsequent judgments or opinions on this information.

The second is the phenomenon of confirmation bias, which is the tendency to seek out information that supports something someone already believes or supports and even avoid obtaining information that may disprove the individual's original position (also referred to as selective devaluation). Cognitively, the human brain overvalues evidence that affirms the positions the individual advocates, while also minimizes, discounts, or even ignores evidence that does not.

The combination of these two phenomena work to selectively highlight and underscore for the party receiving the orally delivered mediator's proposal only those elements of the proposal that pertain to the party's anchored and confirmed positions—such as the monetary component of the proposal—to the exclusion of any other term or condition related by the mediator in the proposal. Anchoring, confirmation bias, and selective devaluation undermine the creativity and objectivity often brought to bear by astute mediators during settlement discussions and resulting mediator proposals, no matter how thoughtfully crafted.

A Reimagined Way to Deliver the Mediator's Proposal

To overcome the foregoing disadvantages, we propose that the mediator's proposal be delivered using a thoughtful, specially constructed writing. Initially, as discussed previously, the mediator should obtain the consent of the parties to deliver the proposal in a writing, separately to each party. This is essential not only to continue upholding party self-determination, but also because a mediator's proposal delivered in writing almost always will cost the parties more in terms of mediator time.⁴ Thus, it is always a best practice to obtain the parties' consent to be able to charge them the additional time it will take to put together the proposal.

The writing itself comprises four parts:

1. *Prefatory.* The first section is the same for each party and comprises the basic parameters of a mediator's proposal, namely, (a) defining a mediator's proposal as one that the mediator makes to all parties simultaneously; (b) the proposal must either be accepted or rejected on the exact terms proposed, without any modifications, in a confidential communication to the mediator; (c) the mediator is not allowed to disclose the responses that the mediator receives unless both responses are "yes"; (d) if so, the proposal becomes the resolution between the parties; but (e) if one party says "yes" and the other party says "no," there is no resolution on the terms and conditions of the proposal, and the party who said "yes" will not be prejudiced if continued negotiations (or subsequent mediations) occur at a later stage of the litigation.

As before, the proposal would also inform the parties that the mediator's proposal is not an evaluation

⁴ Whether or not the mediator invoices the parties for this additional time is a matter of practice preference. For instance, a mediator may choose to waive the additional time if the settlement proposal is rejected, while reserving additional payment for those cases that are fully resolved by the proposed settlement.

of what the case might be worth or what the mediator believes is a “fair” outcome or a recommendation that the parties resolve their dispute under the terms and conditions in the proposal. It is not a deep dive into the evidence the parties might present if the matter were to proceed to trial. Rather, it is the proposal that the mediator believes, based solely upon the information the mediator has reviewed and learned to-date, has the best chance of being accepted by all parties and result in a resolution of the dispute at that time. The proposal would further inform the parties that any new information or developments that were not shared with the mediator during the mediation process, or that may subsequently come to light—for example, during the discovery process—would likely affect the proposal in some way.

2. *Proposed Settlement Terms.* The second section of the writing is also the same for each party and contains the material terms and conditions, both monetary and non-monetary, of the proposal for resolving the dispute.
3. *Private Memoranda.* The third section of the writing is actually packaged in a separate, private memorandum that carefully marries the specific underlying interests and concerns of each party to the terms and conditions of the proposal as best as possible.

That is, unlike the first two sections of the writing, which are identical for each party, this section is tailored specifically to each party. Thus, each party receives a customized writing containing the exact same proposal, with the only salient difference that the mediator makes, through the writing, the “pitch” that the party should accept the proposal and its rationale—legal and factual. For obvious reasons, that “pitch” should read qualitatively differently for each party. This is substantively no different from a mediator’s reframing of proposals (such as during shuttle diplomacy) from one party in such a way as to present it in the light most favorable to the receiving party.

4. *Timing/Manner of Response.* The fourth and final section of the writing is the same for each party and embodies the parties' agreement as to how long they may each consider the proposal and deliver a confidential response—"yes" or "no"—to the mediator. Importantly, the proposal should require a written response from each responding party to avert misunderstandings. Mediators should construe any failure to respond in writing as rejection of the proposal.

Advantages/Benefits of the Reimagined Delivery Method

What are the advantages or benefits of delivering a mediator's proposal in the manner outlined above?

First, this reimagined delivery method helps better preserve party self-determination. Delivering the entirety of the proposal in a written form ensures that the parties and their counsel see and hear it in its entirety. By leveraging the power of the written word, this method minimizes the anchoring, confirmation, and selective devaluation biases that can arise when proposals are delivered orally.

Moreover, the method provides the parties and their counsel with something they can refer to repeatedly, thereby encouraging them to take the proposal more seriously. It also affords an unambiguous, tangible vehicle for ratification by entities outside of the mediation participants (e.g., board of directors, private equity owners), if such approval is needed in order to arrive at a resolution. It also leverages the power of visual learning and reading/writing—two of the four primary adult learning styles (i.e., auditory, kinesthetic, visual, and reading/writing)—by providing a mechanism through which decision-makers may see, and not just hear, of a proposed settlement, its rationale, and how it appeals to their individual, confidentially conveyed core needs, concerns, and interests. The need to appeal to diverse learning styles is not lost on the authors, each of whom has actively delivered adult education courses and continuing legal education seminars to alternative dispute resolution practitioners for many

years. In so doing, they have found that legal practitioners, as with most adult learners, are far more visual than they are auditory. This is why PowerPoint and similar visual presentations tend to enhance learning more so than purely oral presentations. In this light, the authors have found well-crafted mediator proposals to be more impactful than merely oral communication of the same information bearing on key decision points.

This method further ethically obligates attorneys to deliver the proposal to their clients. Under most rules of professional conduct governing attorneys, counsel are required to inform their clients of any decision or circumstance that necessitates the client's informed consent.⁵ In turn, "informed consent" usually signifies the client's agreement to a proposed course of action after the attorney has provided adequate information and explanation about the material risks that are involved and any reasonably available alternatives to that proposed course of action.⁶

Moreover, an attorney is also obligated to keep the client reasonably informed about the status of any matter.⁷ Especially when delivered as an attachment to an email, this method arguably triggers the ethical duty of the attorney to discuss the proposal with the client, making it more difficult for the attorney to ignore the proposal or consciously avoid presenting it to the client.

⁵ See, e.g., ABA Model Rules of Prof'l. Conduct, Rule 1.4(a)(1) ("A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules.").

⁶ See, e.g., *id.*, Rule 1.0(e) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.").

⁷ See, e.g., *id.*, Rule 1.4(a)(3) ("A lawyer shall: . . . (3) keep the client reasonably informed about the status of the matter."). See also N.Y. Rules of Prof'l. Conduct, Rule 1.4(a)(1)(iii) ("A lawyer shall: (1) promptly inform the client of . . . (iii) material developments in the matter including settlement or plea offers.").

In sum, this method:

- Leverages the written word,
- Appeals more effectively to the visual learning and reading/writing styles than does oral (auditory) communication,
- Provides a concrete reference for the proposal,
- Affords a vehicle for ratification, and
- Obligates attorneys to deliver the proposal to the client.

Second, this reimagined delivery method does not compromise mediator neutrality. This method accomplishes that because the proposal marries its terms and conditions to the specific underlying interests and concerns of each party. By doing so, the mediator continues to earn the parties' trust and confidence through a demonstrated understanding and appreciation of those interests and concerns. That is, the mediator shows that the mediator has listened and respected each party's interests and concerns, as articulated throughout the mediation process. As a result, parties will less likely feel or believe that the mediator has compromised the mediator's impartiality in delivering a mediator's proposal, even if the proposal appears to side closer with one party than the other. This is also why it is vital to deliver a separate, tailored writing to each party.

Third, a thoughtful, well-crafted written proposal can cause decision-makers and their counsel to think more slowly at this critical decision point in mediated settlement negotiations, rather than to "think fast." There has been considerable research in the psychology of decision-making in recent years. A cardinal principle has emerged from them—that complex problems and decision-making require affected parties to resist the urge to reach quick decisions. Rather, they should consider more slowly/methodically the myriad factors that typically weigh into the calculus of decision-making. As discussed before, anchoring, confirmation bias, and selective devaluation typically reflect fast thinking that rules out other possibilities for creative solutions if one were to think more slowly.

Even when the proposal is not accepted by one or both parties, delivering it in this manner can and usually does lead

to further negotiations around the terms and conditions of the mediator's proposal. In those situations, the proposal often serves as a jumping-off point for further bargaining and negotiations, oftentimes brokered in whole or in part by the same mediator, who has not lost impartiality in the eyes of the parties.

Does This Method Work?

Both of us used to provide mediator's proposals in the manner initially described—that is, orally and in caucus, with responses usually due on the spot—with mixed results. After converting to the written method described above, we have each personally experienced an empirically higher success rate, that is, either a straightforward acceptance by all parties or continued negotiation using the proposal as a foundation, ultimately leading to a resolution.

There are a few caveats worth noting, however, for those who wish to try this method.

First, as with any undertaking of a mediator's proposal, it is critical that the mediator first disclose the entire method to the parties and obtain informed consent from them to undertake it. Failing to do so would likely compromise the parties' right to self-determination. Aside from preserving party self-determination, the added time and expense of this method counsels for ensuring that the parties have been fully informed and consent to the mediator delivering the tailored written mediator's proposal. Obtaining party consent before undertaking the process is also a worthy check on the essential predicate to all mediations—the trust factor, that is, whether the mediator has engendered sufficient trust in the process and trust in the mediator to vest the mediator with the authorization to fashion proposed settlement terms for a final resolution of the dispute.

Second, as with all types of mediator's proposals, it is also essential that the mediator, in the first instance, feel comfortable enough that the mediator has sufficient information to be able to be in a position to construct a mediator's proposal before deciding to undertake this method. For example, the mediator must be firmly convinced that the mediator has adequately learned/

uncovered the parties' respective underlying interests and concerns so as to be able to fashion a proposal that meets, as best as possible, those interests and concerns. Similarly, the mediator must have a good sense of the parties' respective negotiating ranges.

Third, we have found that this method tends to work best in situations where negotiations or bargaining are not distributive in nature (i.e., not unidimensional) but, rather, integrative. Delivering a written mediator's proposal allows the mediator to dig a little deeper and demonstrate to the parties the value that the mediator brings to the process. With this critical information, the mediator might better assess the likelihood of at least one of the parties accepting the proposal. This could be a helpful benchmark in determining whether to offer the proposal process as a last-minute impasse-breaking measure.

Finally, we have found that this method tends to work best in situations where the amount in controversy or the stakes are comparatively larger. Those types of disputes better justify the additional time and expense of the mediator undertaking to set forth the proposal in writing and delivering it to the parties in the manner described above. This is also another reason why a distributive bargaining situation is usually not well suited for this method because those situations do not generally warrant that additional time and expense.

Conclusion

A mediator's proposal is not a technique that every mediator is comfortable undertaking. And, as an impasse-breaking technique of last resort, it should not be often or routinely used. But in those situations where a mediator's proposal either is requested by the parties or makes sense for reasons specific to the circumstances of the negotiation, the tailored written mediator's proposal—a reimagined way to deliver such a proposal—may yield better party satisfaction with the process.