

Should Mediators Make Proposals



the missing peace

By Bill Eddy, LCSW, Esq.

When working with high-conflict cases in mediation – or any mediation – it's not unusual for the parties to turn to the mediator and ask: “What would you propose?” While we all know that the parties should be the ones to make proposals in mediation, they often don't have much knowledge or experience in resolving the types of disputes that bring them to mediation. Family disputes, neighbor conflicts, small claims cases, business and workplace disputes, construction defects, personal injury claims, and others are often confusing and stressful for the parties involved – so they often seek a quick solution from the mediator.

Yet agreements that the parties themselves make are well-known to be more workable and longer-lasting. High-conflict individuals often fight against any decisions or directions that seem to come from others, so that they need to participate in making decisions as much as possible in order to follow them. While “evaluative” mediators and settlement judges may say specifically how they think a case should settle, the following ideas can help to establish a stronger agreement with more “thinking” by the parties.

In many cases nowadays, people come to mediation without lawyers or other advocates, so that they rely on the mediator for legal information, examples of what others have done in similar situations and a quick (and inexpensive) resolution of their dispute. In more formal disputes, lawyers often participate in the mediation with the parties but they rely on the neutral mediator to come up with solutions when their own clients seem stuck in their positions and, out of loyalty to their clients, they are limited in how flexible they can appear to be in making proposals to the other “side.” The discussion below can apply whether the parties meet together for the whole mediation or most of it (my preferred approach) or are separated all of the time with the mediator going back and forth.

Not So Fast

First, it's important for a mediator to help the parties *exhaust* their own efforts at making proposals – especially in high-conflict cases. If they are going to make an agreement work and last, they have to have a sense of ownership in it. Helping them become more engaged in settling the issues can be done by teaching them a 3-step process for making proposals. This engages their own creative thinking and shifts them from quickly reacting and blaming to problem-solving:

1. Make a proposal which includes: WHO will do WHAT, WHEN and WHERE.

2. The other party then must ask at least two questions about the proposal. This should not include WHY questions, because they are usually really criticisms. The proposing person should answer these questions as matter-of-factly as possible.
3. Then, the responding party should say “Yes.” “No.” Or: “I’ll think about it.” If he or she says “I’ll think about it,” ask how much time they will need (such as 5 minutes, a day, a week).

The mediator should also ask some questions about the proposal, to help demonstrate an objective search for solutions. The mediator should discourage the parties from quickly saying “No” to each other’s proposals, and instead say: “I have some questions also, which will help me to help you understand where you might find room for agreement.” This slows down the rapid-fire rejection and appearance of impasse that often occurs, especially with high-conflict parties.

By training them in this 3-step method (which you can do before or during the mediation), you get them thinking about the future and picturing solutions to their problems. This is necessary in helping them make more realistic proposals. Often the parties simply want to rehash their positions and complaints about each other. With this rational 3-step process, you avoid getting “hooked” into their helplessness and you can often redirect them into *thinking* about their future options at least.

Suggest Sources of More Information

If they appear to be at an impasse, for a while stick with the idea of exhausting their efforts to come up with proposals first. Ask them where they might find more information with which to make more proposals, or who they might consult individually or jointly. You can suggest possible sources they could consider, as they may be unfamiliar with resources you know well.

If there will be another mediation session, encourage them to consider preparing two proposals for the remaining issues, so that they have a backup plan if their first one is not readily accepted by the other person.

Suggest Three Options Others Have Done

Once the parties have exhausted their efforts to make proposals, the mediator might offer three alternatives that others have done. The benefit of offering “what others have done,” is that there is less appearance that you are actually taking over responsibility for resolving the dispute by saying what you propose that they do. If you do that with high-conflict parties, you are guaranteed to do it “wrong,” they will blame you for it and resist it anyway.

If you only provide one option, there is a great risk that one party will like it and the other party will dislike it – and you will appear to have taken sides with the party who likes it. This is especially a risk when one or both parties have high-conflict personalities.

Avoid offering just two scenarios, as you will risk that one party likes one and the other party likes the other. Therefore, it’s best to offer three options, which gets them to really think about the pros and cons of each, and whether there is something in these three options that might help them resolve their dispute. These options could be very specific, based on your experience, or could be very general.

Suggest General Approaches to Consider

The following are other general ways the mediator can avoid resolving the dispute, while giving the parties more guidance for their proposals. One or more of these approaches can be suggested, without specifying how it should be used in the case at hand. “Does this approach sound like it would be helpful to you? Why don’t you picture what some of your proposals might be using this approach, then decide if it’s helpful or not.” This helps focus the parties more narrowly, without taking over their role in resolving the dispute.

- 1) **Phased-in plan.** Starting with what one proposes now and ending up with what the other proposes over time. This can help with finding compromises regarding payment plans, pay raises, child support, transferring job responsibilities, a timeline for a big project and so forth.
- 2) **Splitting the difference.** This simple approach has resolved millions of financial disputes over the years. It’s very common knowledge that financial settlements end up approximately in the middle of the parties’ first proposals. Of course, some people make extreme proposals based on this idea, which alienates the other person who then refuses to negotiate further. So keep original proposals within the “ballpark” of what is reasonable under the circumstances.
- 3) **Refining their proposals and then flipping a coin.** While this is not elegant, it is quick and simple. This is the “Last Best Offer” approach and sometimes a third party (but not the mediator) picks the one that seems the most reasonable. It is also similar to what may happen in court in those cases where the outcome is quite unpredictable.
- 4) **Getting a recommendation.** With some issues, there are experts who could be consulted who will make a recommendation, which the parties can bring back to mediation. Such a recommendation can be a reality check, which often puts the parties into the same “ballpark” from which they can negotiate more realistically. The mediator can then help them “tinker” with the recommendation to make it their own agreement.
- 5) **How far will you go?** One method occasionally used is to have both parties write down on a separate piece of paper (so the other party can’t see) how far they are willing to go to resolve their dispute (dollar amount, parenting percentage, etc.). Then they fold these up and hand them to the mediator, who looks at them under the table out of sight of the parties. The mediator then announces that it looks *likely* they will reach an agreement (if these “bottom lines” overlap), and then asks for new proposals; or announces that it looks *unlikely* they will reach an agreement, but does either party want to make a last effort to bridge the gap? Sometimes, people are still able to make new proposals and reach agreements, even when their “bottom lines” didn’t overlap. Of course, try to avoid using the term “bottom line” out loud, because it risks locking the parties into what they wrote down – when in fact most parties are still willing to go a little farther to settle their dispute.

By suggesting one or more of these approaches, the mediator gives the parties more guidance, without directing the outcome. However, sometimes I have found it necessary with high-conflict parties to spell it out for them in greater detail. For example, saying: “What would it look like if

child support started out at the level Mary has proposed and then after some period of time – that you two agree on – it ends up at the level John is proposing?”

On rare occasion, usually in a separate caucus, I will say: “Some people split the difference, which in your case would be around \$1000. If the other party were to agree to that number (and I don’t know if they will), would that be something that could work for you? Don’t tell me now, just think about it while I speak to the other party.” Then I ask the other party the same question. Coming from me, they usually say it could work for them. I only use that in extreme cases, because they are usually able to reach agreement using the three options approach or the general approaches I have described above.

Conclusion

Mediation is based on principles of self-determination, voluntary consent to specific terms and client empowerment (among other values, such as confidentiality, neutrality of the mediator, full disclosure of any conflicts of interest and competence to mediate the issues at hand). When parties in mediation ask the mediator to make a proposal or recommendation, it is important to show empathy and understanding for their request, while at the same time resisting the urge to simply tell them what to do.

This is especially important when one or more of the parties has a high-conflict personality. They tend to get angry when told what to do, even when they ask for it. To them relationships are inherently adversarial and they feel compelled to resist direction from others, sooner or later. The better way to help them is to give them three alternatives to consider or general approaches to resolve their dispute. Then they get the credit and often fill in the details much more appropriately than the mediator could possibly do. While it takes patience, even high-conflict people can resolve their disputes in mediation in the majority of cases.

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