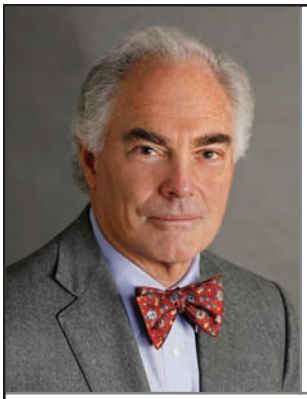

MEDIATOR'S PROPOSALS: GOD'S GIFT TO MEDIATION, OR A BETRAYAL?

By Martin Quinn, Esq.

Once upon a time some 35 years ago, mediation was talked about in the United States as a tool to cure dissatisfactions with the civil justice system. The great early teachers and scholars of mediation -- Frank Sanders, Christopher Moore, Leonard Riskin and others -- envisioned a process focused on party autonomy that would allow disputants not merely to resolve an immediate legal problem, but to reorient their personal or business relationships into a productive path. Early mediations were usually conducted without counsel in a highly facilitative model in which the parties and the mediator remained together for all or most of the session.

This model in legal mediations has, of course, largely given way as attorneys entered, and came to dominate, the process. Legal mediation today relies heavily on private caucusing and has largely abandoned any substantive joint session. Mediators are likely to be highly directive, if not explicitly evaluative, in pushing the parties to an agreement. Party autonomy has receded, while the power of attorneys and the mediator to influence the result has expanded. One result of this evolution is the growing use of the mediator's proposal to bring about closure.

A frequently employed tactic, the mediator's proposal, works like this: The parties have exhausted their ability to negotiate further. Neither side can in good conscience accept further compromises. But they are close enough to a deal that both sides appreciate that a final effort makes sense. Assume plaintiff is demanding $250,000, and defendant has offered $190,000. The mediator proposes a dollar number (or more detailed terms) between the two positions, based not on a legal evaluation of the case but on the mediator's judgment as to a number that both sides are most likely to accept. A mediator may tell the parties that her proposal has nothing to do with Truth and Justice, but is the number her stomach tells her is most likely to draw two "Yes" responses. Each side may say "Yes" or "No." If there are two "yes" responses, there is a settlement. If there is a "Yes" and a "No" or two "No's," the mediator says only that there is no settlement -- without revealing the responses of either side. Therefore, each side knows that it may respond "Yes" secure in the knowledge that its compromise will never be disclosed unless there is a deal.

A busy legal mediator reports that he now uses a mediator's proposal in about two-thirds of his cases. Why? First, it works. Neurological research teaches that reactive devaluation – the tendency to reject any proposal from an opponent – diminishes greatly when a neutral proposes the compromise. Second, attorneys with mediation experience have come to expect a mediator's proposal and negotiate accordingly: intentionally leaving bargaining room open knowing that the mediator will propose the one final compromise. Thus cases that would likely have settled through party negotiation alone now arrive at impasse as each side anticipates a mediator's proposal. Third, a mediator's proposal allows the party representatives to feel -- and to tell their bosses -- that they held firm but the mediator "made them do it."

A savvy mediator will be selective in when and how to make a proposal. A proposal should not be made until the parties have truly reached a dead end. Also, the remaining divide should be small enough to give the proposal a good chance of success. A very rough rule of thumb might be that the gap should be not more than $20,000 in a 5-figure case, $100,000 in a 6-figure case and $200,000 in a 7-figure case. Finally, the mediator should believe the proposal has at least a 50% chance of success.

Is there life in a mediation after a failed proposal? The mediator's proposal has the most power when the parties know that it will be their last chance to reach a deal in this mediation. If it fails, the mediation is over. End of day. But in practice many mediators will try to pick up the pieces after a failed proposal. The mediator, having disclosed the terms he believes should be acceptable, has lost some of his neutrality and persuasive power. Nonetheless, having devoted time and expense to reach a mediated solution, most parties are willing to have the mediator continue to try to close the gap.

Counsel will often try to game the process by manipulating the mediator into making a proposal they like. They will ask the mediator what she intends to propose, or say that their

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client would accept a particular number. These conversations may give the mediator valuable insight into what number to propose, but in the end the number must be the mediator's own sole choice. Some mediators will ask the parties whether they would accept a proposal within a certain range, not wanting to make a proposal that is dead on arrival. Other mediators keep their thinking wholly confidential.

Mediators have traveled a long journey from the pure facilitative days. The growing use of mediator's proposals is the latest development that diminishes party autonomy and shifts responsibility for creating the settlement to the mediator. Your view of mediator's proposals will depend on whether you believe the mediator's objective is to reach settlement at all costs, or is primarily to assist the parties to repair their damaged relationships regardless of whether they settle the immediate dispute. You will either welcome the growing use of mediator's proposals with delight as a valuable tool to resolve difficult, high-stakes legal disputes, or you will deplore the vanishing of hands-off facilitative mediators who strove for deeper resolutions than mere settlement. ■

Martin Quinn, Esq. is a JAMS neutral, based in San Francisco. He specializes in resolving business and complex tort disputes and frequently acts as special master in complex federal and state actions. He can be reached at mquinn@jamsadr.com.