

Mediator settlement proposals: a perspective

A written proposal sets forth crucial deal points to break a negotiation impasse

By Marc D. Alexander

A mediator's settlement proposal has been described as "the exact point in time where the mediator ran out of skills." However, we offer a different perspective. Properly used, the mediator's settlement proposal can be a useful skill for breaking a negotiation impasse.

What is a mediator's settlement proposal?

A written mediator's settlement proposal sets forth crucial deal points to break a negotiation impasse. It is addressed to attorneys representing the parties. It can be simple or detailed, but it must set a deadline for acceptance or rejection. It should explain the process that two acceptances result in an agreement. Any rejection means there is no agreement.

To avoid a misunderstanding, it is best practice for the mediator to write out the proposal and require a written and executed response. For example, a known mediator invites a reply to a one-page mediator settlement proposal with a dollar amount, a large box labeled "Accepted," and a little box labeled "Rejected." Mediator Michael S. Fields uses a more formal example of a mediator's settlement proposal. (See exemplar on page 3.) As with any settlement agreement, "no one size fits all."

Most litigants and some attorneys may be unfamiliar with a mediator's settlement proposal. The process is "double-blind" and confidential. However, in a two-party case, if one party accepts and one rejects, the accepting party will necessarily know the opposing party rejected the proposal. Such knowledge will most likely require the accepting party to reevaluate the potential for settlement.

As a word of caution, an email proposal should be sent *separately* to each side's attorney. Doing so prevents an inadvertent "reply all" email click that improperly notifies the opposing party of acceptance or rejection, destroying the proposal's double-blind feature.

Parties should be allowed enough time to respond. Sometimes, this requires time to communicate with decision-makers who did not attend the mediation. Those absent persons could be corporate officers, board members, insurance company superiors, government officials, experts, attorneys, or spouses. With too much time, parties may drift away from engaging in a settlement, overthink it, and suffer premature buyer's remorse agonies.

Attitudes about mediator settlement proposals

A common objection to using a mediator's settlement proposal is that it adversely affects the extent to which a negotiated outcome is voluntary and self-determined. However, proponents of mediator proposals reply that voluntariness and self-determination are not eliminated because parties can reject the proposal.

Despite criticism, many mediators successfully use settlement proposals to resolve disputes. An expeditious dispute resolution resulting in finality, certainty, and lower transaction costs than full-blown litigation explains why a mediator's settlement proposal is commonly used.

When should a mediator's settlement proposal be made?

A mediator's proposal is inappropriate until the parties reach a negotiation impasse. A premature proposal can warp the course of negotiations. Working to position themselves for a favorable mediator's proposal, parties may stop negotiating toward a settlement and trigger an impasse.

Parties often concentrate on the midpoint between the last dollar demand and the last dollar offer. However, a defendant may trigger an impasse by refusing to respond with a counteroffer to the plaintiff's last demand at the hint of a mediator's proposal. This keeps the midpoint between last demand and last offer from increasing. Or the plaintiff triggers an impasse by refusing to respond to the defendant's last offer. This keeps the midpoint between demand and offer from decreasing. Thus, the expectation of an imminent mediator's proposal can give the party causing a negotiation impasse an advantage.

The further apart the parties are at the point of impasse, the less likely a mediator's proposal will succeed. Some mediators will not make a proposal if the parties are more than 20% apart. However, suppose the mediator has an indication that one of the parties is likely to accept the mediator's proposal. That insight may help fashion a successful proposal, even when the parties are ostensibly far apart.

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Sometimes a mediator's proposal may be worth making even though the parties are far apart. For example, in a small case where continuing to "bleed attorney's fees" will make success at trial a Pyrrhic victory, a mediator's proposal may be a worthwhile effort.

Because there can be good reasons *not* to make a mediator's settlement proposal, many mediators will not make one without authorization by counsel. Additionally, the mediator should consider alternative tools for breaking an impasse, such as taking a timeout, caucusing with parties who appear to be helpful, or scheduling another session to allow time to exchange needed information.

What expectations do participants have about a mediator's settlement proposal?

Suppose after several demands and counteroffers, the plaintiff demands $500,000, the defendant offers $300,000, and the parties have reached an impasse 90 days before a scheduled jury trial. Legal costs and fees are about to mount, and the mediator suggests making a mediator's settlement proposal.

The attorneys and parties will often want to know in advance what the mediator's proposal will be. For example, the mediator could say it will be between $500,000 and $300,000 and caucus with each side, hoping to find a zone of possible agreement. However, a mediator's proposal often requires each side to stretch beyond its final offer or demand, and the zone of possible agreement may not be revealed until after the proposal is made.

Because common expectations are that a mediator's settlement proposal splits the difference, a proposal straying far from the midpoint between the last demand and offer will likely be viewed as unfair by one side. While a mediator's proposal that "splits the difference" may align with the parties' expectations, it is an expedient effort to promote an intelligent business decision and resolution.

Complications with multiple parties

A challenge encountered with multiple parties occurs when acceptance of the mediator's settlement proposal by one party needs to be linked to acceptance of the proposal by other parties. When allocation is an issue, parties may feel it is a mistake to pay a particular amount to settle a case if they do not know what other parties are paying.

Sometimes the plaintiff and defendants are willing to settle separately without regard to what each defendant is willing to pay. In other words, the settlements are not linked. In such circumstances, the mediator could propose separately to each defendant. A defendant ready to settle alone may want to include a good-faith settlement motion as a part of the mediator's proposal and request that the mediator include that requirement in the proposal.

Defendants insisting on a global settlement may refuse a settlement proposal unless they know the terms other defendants receive and accept. Under those circumstances, a single settlement proposal should be sent to all the parties, explaining there will be no settlement unless all parties accept the proposal. Then, the mediator can devise an allocation of payment among the parties.

A mediator who allocates settlement amounts among defendants takes on great and perhaps unnecessary responsibility. Another approach is to provide a single settlement amount for all defendants to accept, providing them with a deadline to allocate amounts among themselves.

Because a mediator's settlement proposal can be presented in different ways in a multi-party case, it is worth discussing how it will be presented to the attorneys before proposing the settlement terms. A "buy-in" to the procedure by the parties can increase the likelihood that the settlement proposal will be successful.

Does acceptance of the mediator's settlement proposal result in a binding contract?

Given California's strict mediation-confidentiality protection under Evidence Code section 1119, a written acceptance of a mediator's settlement proposal does not necessarily result in a *binding* agreement. However, under Evidence Code section 1123, acceptance of a mediator's settlement proposal reached during a mediation *in-person session* is admissible *if* it is "*signed by the settling parties*" and one of *four* conditions under subdivisions (a)-(c) is met. One solution is to create a *signed* written agreement satisfying the code requirements containing words that the settlement agreement is subject to *disclosure*, *binding*, *enforceable*, "or words to that effect." (See *Fair v. Bakhtan* (2006) 40 Cal.4th 189.)

With many mediations conducted on Zoom or a similar platform, an original signature required by section 1123 may not be obtainable. Moreover, as of the date this article is prepared, caselaw does not qualify an *email* acceptance of a mediator's settlement proposal as an enforceable signature. (See *J.B.B. Investment Partners, Ltd. v. R. Thomas Fair* (2014) 232 Cal.App.4th 974.)

Note that a mandatory settlement conference (MSC) conducted under Resolve Law LA rules is not a "mediation" subject to the confidentiality rules established under Evidence Code sections 1115-1129. (See Cal. Rule of Court, rule 3.1380, subd. (d), Advisory Committee Comment.)

Under Evidence Code section 1118, an oral agreement can be put on the record, and words can be added that the agreement is admissible and binding. However, the oral agreement must be followed up within 72 hours by a written agreement.

Additionally, acceptance of a mediator's settlement proposal may not result in a binding contract when it is made subject to further conditions, such as the drafting and execution of a mutually acceptable agreement

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Mediator's Settlement Proposal dated_____

Al Jones v. Bee Smith

Case Number: _____

Dear Counsel:

This email attachment is a proposal for settlement of the referenced case presented by mediator (or court appointed MSC officers) _____. The proposal is made after discussions with the parties and evaluating liability and damages.

THE PROPOSAL:

Defendant Bee Smith shall pay to plaintiff Al Jones the sum of $_____ in exchange for plaintiff Al Jones' acceptance of said sum and release of all defendants with prejudice. Each party is to bear their attorney fees and costs, and plaintiff Al Jones is responsible for any and all medical liens.

HOW TO ACCEPT OR REJECT THE PROPOSAL:

Acceptance or rejection of the proposal is to be made by EMAIL on or before **noon PST, Wednesday, September __, 2023**, *only* to mediator (or MSC officers)

Joe Justice, Esq. [email address]

Email acceptance by a party or counsel for a party is a signature acceptance that makes the agreement binding and disclosable under Evidence Code section 1123 and enforceable under Code of Civil Procedure section 664.6.

The mediator will advise the parties the case has been settled if both parties timely accept the proposal. However, if either party rejects the proposal, the parties will be notified the case has not settled without identifying the rejecting party.

Failing to accept or reject the proposal within the time allotted is a rejection, and the parties will be notified by the mediator there is no settlement. However, if either party decides not to respond and thereby rejects the proposal, a courtesy notification to the mediator would be appreciated.

SETTLEMENT DOCUMENTS AND PAYMENT:

Defendant or its insurance carrier shall issue the settlement check to plaintiff and plaintiff's counsel within ten days after receipt of executed settlement documents. Plaintiff's counsel shall be responsible for filing a timely settlement notice with the court.

and release. However, including conditions may be the only way to bring the parties together, even though it creates uncertainty and a lack of finality.

If federal common law governs, it may prevail over California mediation-confidentiality protections. Acceptance of the mediator's proposal is admissible to establish mutual acceptance of the mediator's proposal and a binding contract. (See *In re TFT-LCD* (9th Cir. 2016) 835 F.3d 1155.)

Following up on failure

There is no agreement when one party accepts a mediator's settlement proposal and the counterparty rejects the proposal. The mediator, however, has not necessarily exhausted all the mediator's moves. For example, there is likely no agreement if one party adds a term to an acceptance. Such an additional term can invite further negotiation resulting in a settlement.

Rejection of a mediator's proposal by one side need not signal the end of the negotiation. Instead, when rejection occurs, the mediator can often follow up with more discussion and negotiation while being careful not to breach confidentiality. Even a mediator's settlement proposal that is not

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accepted can eventually lead to a settlement.

Remember that the accepting party, whether the plaintiff or the defendant, knows from the failure to reach an agreement that the counter-party rejected the mediator's settlement proposal. Therefore, the mediator can go to the accepting party and continue to explore a settlement. The mediator avoids breaching confidentiality if the accepting party is willing to waive confidentiality and make a new settlement proposal. The mediator can also ask the rejecting party what it would take to settle.

When both sides reject a mediator's settlement proposal, the mediator may feel a sense of relief, for it is unlikely that any mediator proposal would have succeeded.

Conclusion

A mediator's settlement proposal is a tool used by many mediators to obtain a resolution of a difficult negotiation. The mediator uses instinct and observation in formulating the settlement proposal, with frequent positive results.


Alexander

Marc Alexander mediates with ARC. *After graduating from UCLA Law, where he served as articles editor for the UCLA Law Review, he clerked for 9th Circuit Judge Warren J. Ferguson. Marc litigated civil cases at Irell & Manella, JacksonTidus, and AlvaradoSmith APC for 35 years. Marc is an editor of the CLA's California Litigation Journal. Email: marcdalexander@gmail.com.*

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